100

FILED

No. ① 08-99 JUL 21 2003

OFFICE OF THE CLERK
WILLIAM K. SUTER, CLERK

In The
Supreme Court of the United States

SEVEN UP PETE VENTURE, an Arizona general partnership dba Seven Up Pete Joint Venture; CANYON RESOURCES CORPORATION, a wholly owned subsidiary of Atna Resources, Ltd.; JEAN MUIR; IRENE HUNTER; DAVID MUIR; ALICE CANFIELD; TONY PALAORO; JUNE E. ROTHE-BARNESON; AMAZON MINING COMPANY, a Montana partnership; PAUL ANTONIOLI; STEPHEN ANTONIOLI; and JAMES E. HOSKINS,

Petitioners,

v.

BRIAN SCHWEITZER, Governor of the State of Montana; and RICHARD OPPER, Director of the Montana Department of Environmental Quality,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM PERRY PENDLEY*
**Counsel of Record*
JOEL M. SPECTOR
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

ALAN L. JOSCELYN
GOUGH, SHANAHAN, JOHNSON & WATERMAN
P.O. Box 1715
Helena, Montana 59624
(406) 442-8560

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In 1998, Petitioners' property was rendered worthless by a ballot initiative that prohibited Petitioners from engaging in a type of mining that theretofore had been legal for more than one hundred years. Thereafter, Petitioners, seeking "just compensation," brought a Fifth Amendment takings claim in federal court, and a state takings claim in Montana state court. Pursuant to *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964), Petitioners expressly advised the Montana state courts that they were reserving their federal takings claims for adjudication in federal court.

The federal case was stayed pending the outcome of the state proceedings. After the Montana state courts failed to provide Petitioners with just compensation under the Montana constitution, Petitioners returned to federal court to pursue their Fifth Amendment takings claim. Because the federal district court concluded that the Eleventh Amendment bars Fifth Amendment takings claims against states in federal court, it dismissed the case. The Ninth Circuit affirmed, holding that the Eleventh Amendment bars suits against states, premised on federal constitutional violations, in federal court.

The question presented is whether the Eleventh Amendment bars Fifth Amendment takings claims by a private property owner against a state in federal court after the highest court of the state has denied the property owner's state takings claim.

LIST OF PARTIES AND RULE 29.6 DISCLOSURE

Petitioners: Seven Up Pete Venture, dba Seven Up Pete Joint Venture, is a Montana general partnership whose partners are Canyon Resources Corp. (36.125 percent share) and CR Montana Corp. (63.875 percent share). CR Montana Corp. is a Colorado corporation, and is a wholly-owned subsidiary of Canyon Resources Corp. Canyon Resources Corp. is a Delaware corporation that merged into Atna Resources, Ltd. and is now its wholly owned subsidiary. Atna Resources, Ltd. is a publicly traded Canadian corporation, incorporated in British Columbia, which has one major shareholder, Anglo Pacific Group PLC of London, England; it owns more than 10 percent (13.3 percent in last public filing) of the corporation's stock. Amazon Mining Company is a Montana partnership.

The other Petitioners are Jean Muir; Irene Hunter; David Muir; Alice Canfield; Tony Palaoro; June E. Rothe-Barneson; Paul Antonioli; and Stephen Antonioli. James E. Hoskins, another Petitioner, is deceased; his interest has been distributed to his three sons: William Hoskins, Alan Hoskins, and Stephen Hoskins.

LIST OF PARTIES AND RULE 29.6 DISCLOSURE – Continued

Respondents: Brian Schweitzer is the Governor of the State of Montana and Richard Opper is the Director of the Montana Department of Environmental Quality.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.6 DISCLOSURE	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	9
I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT REGARDING SOVEREIGN IMMUNITY AND THE ELEVENTH AMENDMENT	9
A. The Ninth Circuit's Decision Conflicts With This Court's Fifth Amendment Analysis In *First English*	9
B. The Ninth Circuit's Decision Conflicts With This Court's Waiver Analysis, As Enunciated In *Fitzpatrick* And *Central Virginia Community College*	11
C. The Ninth Circuit's Decision Conflicts With This Court's Explanation In *Alden* That State Sovereign Immunity In State Court Is Analogous To State Sovereign Immunity In Federal Court	16

TABLE OF CONTENTS – Continued

Page

II. THE NINTH CIRCUIT FAILED TO APPLY A STRICT TEXTUAL INTERPRETATION OF THE ELEVENTH AMENDMENT 20

A. This Court Interprets The Constitution Based On Its Text..... 20

B. The Ninth Circuit Interpreted The Eleventh Amendment In A Manner Contrary To Its Text 22

III. THE NINTH CIRCUIT'S DECISION FRUSTRATES THE FRAMERS' INTENT TO PROTECT INDIVIDUALS FROM STATE COURT BIAS 28

IV. THIS COURT SHOULD TAKE THE OPPORTUNITY TO EXTEND THE *EX PARTE YOUNG* RATIONALE TO SUITS IN WHICH STATES ARE ALLEGED TO HAVE VIOLATED THE CONSTITUTION 31

CONCLUSION..... 35

APPENDIX

Seven Up Pete Venture v. Schweitzer, Opinion, No. 06-35384 (9th Cir. April 21, 2008).....App. 1

Seven Up Pete Venture v. Schweitzer, Order and Judgment, No. CV 00-13-H-CCL (D.Mont. April 11, 2006).....App. 19

TABLE OF CONTENTS – Continued

Page

Seven Up Pete Venture v. Montana, Order Denying Petition for Writ of Certiorari, No. 05-588 (U.S. Feb. 21, 2006) ..... App. 31

Seven Up Pete Venture v. Schweitzer, Order, No. CV 00-13-H-CCL (D.Mont. Jan. 30, 2006) ..... App. 32

Seven Up Pete Venture v. State of Montana, No. 03-154 (Mont. June 8, 2005) ..... App. 35

Seven Up Pete Venture v. Racicot, Order, No. CV 00-13-H-CCL (D.Mont. March 25, 2004). App. 83

Seven Up Pete Joint Venture v. State of Montana, Order, No. BVD 2000-250 (D.Mont. Dec. 9, 2002) ..... App. 85

Seven Up Pete Venture v. Montana, Order, No. BDV 2000-250 (Mont. 1st Judicial Dist., Lewis and Clark County, Nov. 1, 2001) ..... App. 116

Seven Up Pete Venture v. Racicot, Order, No. CV 00-13-H-CCL (D.Mont. Sept. 4, 2001) ... App. 145

U.S. Const. art. III, § 2, cl. 1 ..... App. 166

U.S. Const. amend. V ..... App. 167

U.S. Const. amend. XI ..... App. 168

U.S. Const. amend. XIV ..... App. 169

Mont. Code § 82-4-390 ..... App. 171

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) ..... *passim*

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 24, 26, 28

Bank of U.S. v. Deveaux, 9 U.S. 61 (1809) 29

Central Virginia Community College v. Katz, 546 U.S. 356 (2006) 15, 16

Citadel Corp. v. Puerto Rico Highway Auth., 695 F.2d 31 (1st Cir. 1982) 8

City of Boerne v. P.F. Flores, 521 U.S. 507 (1997) 21

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) 32

Cohens v. Virginia, 19 U.S. 264 (1821) 26, 30

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999) 16

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004) 8

Dred Scott v. Sandford, 60 U.S. 393 (1857) 22

Edelman v. Jordan, 415 U.S. 651 (1974) 12

England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1964) 6, 30

Ex parte Virginia, 100 U.S. 339 (1879) 12, 13, 15

Ex parte Young, 209 U.S. 123 (1908) 8, 31, 32, 33, 34

TABLE OF AUTHORITIES – Continued

Page

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 8, 9, 10, 11, 14

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 9, 12, 13, 16

Garrett v. Illinois, 612 F.2d 1038 (7th Cir. 1980) 8

Granholm v. Heald, 544 U.S. 460 (2005) 20

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 29

John G. & Marie Stella Kenedy Mem'l Found. v. Mauro, 21 F.3d 667 (5th Cir. 1994) 8

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) 21

Minnesota v. Dickerson, 508 U.S. 366 (1993) 21

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 10

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) 23

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 13

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 23, 24

Reich v. Collins, 513 U.S. 106 (1994) ..... *passim*

Robinson v. Ga. Dep't of Transp., 966 F.2d 637 (11th Cir. 1992) 8

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 23, 24, 27

Seven Up Pete Venture v. Montana, 546 U.S. 1170 (2006) 2, 7

TABLE OF AUTHORITIES – Continued

Page

Seven Up Pete Venture v. Schweitzer, 2006 WL 1194088 (D.Mont. 2006) 7

Seven Up Pete Venture v. Schweitzer, 523 F.3d 948 (9th Cir. 2008) 2, 8

South Carolina v. U.S., 199 U.S. 437 (1905) 21

State Board of Equalization of California v. Young's Market Co., 299 U.S. 59 (1936) 21

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 7

Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468 (1987) 11

Will v. Michigan Department of State Police, 491 U.S. 58 (1989) 9

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 6

U.S. CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V ..... *passim*

U.S. Const. amend. XI ..... *passim*

U.S. Const. amend. XIV, § 1 ..... 3, 12, 13

U.S. Const. amend. XIV, § 5 ..... 3, 12, 13, 14

U.S. Const. art. I, § 8, cl. 4 ..... 15, 17

U.S. Const. art. III, § 2, cl. 1 ..... *passim*

U.S. Const. art. IV, § 3 33

TABLE OF AUTHORITIES – Continued

Page

MONTANA CONSTITUTIONAL PROVISION

Mont. Const. ordinance 1, § 5 (1889) 16

U.S. STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1331 .....2, 6

25 Stat. 676 (1889).....33

MONTANA STATUTES

Mont. Code Ann. § 82-4-335(1).....5

Mont. Code Ann. § 82-4-390 4

OTHER AUTHORITIES

Clarence Thomas, *Judging*, 45 U. Kan. L. Rev. 1 (1996).....22

Neal Miller, *An Empirical Study of Forum Choice in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 3693 (1992).....29

Proclamation No. 7 of President Harrison, 26 Stat. 1551 (Nov. 8, 1889).....16, 34

The Federalist No. 80 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).....29, 30

PETITION FOR WRIT OF CERTIORARI

Seven Up Pete Venture, Canyon Resources Corporation, Jean Muir, Irene Hunter, David Muir, Alice Canfield, Tony Palaoro, June E. Rothe-Barneson, Amazon Mining Company, Paul Antonioli, Stephen Antonioli, and James E. Hoskins (hereinafter "Seven Up Pete") hereby petition this Court for a writ of certiorari to review the opinion of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The August 30, 2001, order of the U.S. District Court for the District of Montana granting a stay in the federal case to enable Seven Up Pete to litigate its state takings claims in state court is unpublished, but is reproduced at App. 145. The November 1, 2001, unpublished order of the Montana District Court granting summary judgment in favor of the State of Montana on some of the claims and denying summary judgment on the takings claims is reproduced at App. 116. The December 9, 2002, unpublished order of the Montana District Court granting summary judgment in favor of the State of Montana on the state takings claims is reproduced at App. 85. The June 8, 2005, Montana Supreme Court decision affirming the order of the Montana District Court is published at 114 P.3d 1009, and is reproduced at App. 35. This Court's February 21, 2006, denial of Seven Up Pete's petition for certiorari in its appeal from the Montana

Supreme Court is published at 546 U.S. 1170 and reproduced at App. 31.

On April 11, 2006, the U.S. District Court for the District of Montana dismissed Seven Up Pete's federal Takings Clause claims. That opinion can be accessed at 2006 WL 1194088 and is reproduced at App. 19. On April 21, 2008, the Ninth Circuit affirmed the federal district court decision; that opinion is published at 523 F.3d 948 and reproduced at App. 1.

JURISDICTION

The district court had jurisdiction over Seven Up Pete's claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on April 21, 2008; thus, pursuant to Supreme Court Rule 13, this Petition is filed timely within 90 days of the entry of final judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides: "[N]or shall private property be taken for

public use, without just compensation." U.S. Const. amend. V; App. 167.

The Eleventh Amendment to the U.S. Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI; App. 168.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; App. 169.

Likewise, section 5 of the Fourteenth Amendment to the U.S. Constitution provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5; App. 170.

Article III, § 2, cl. 1, of the U.S. Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made,

> under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1; App. 166.

Montana Code Annotated § 82-4-390 provides:

> (1) Open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore-processing reagents is prohibited except as described in subsection (2).
>
> (2) A mine described in this section operating on November 3, 1998, may continue operating under its existing operating permit or any amended permit that is necessary for the continued operation of the mine.

Mont. Code Ann. § 82-4-390; App. 171.

STATEMENT OF THE CASE

This case arises out of Montana State Initiative 137 ("I-137"), passed in November 1998 and codified as Mont. Code Ann. § 82-4-390, which banned, for the

first time in the history of Montana and, indeed, the Nation, open-pit mining for gold and silver using cyanide heap leaching in Montana. App. 171; App. 5. Plaintiffs owned state mineral leases and private property rendered worthless by I-137. *Id.*

Specifically, in 1991 Seven Up Pete acquired six leaseholds of state-owned mineral estates in addition to surface mineral fee estates in the vicinity of Lincoln, Montana. App. 4. The land encompassed by the leases and fee estates likely contains more than four million ounces of gold and ten million ounces of silver that could be recovered profitably through open-pit extraction combined with cyanide leaching of the ore. *Id.* During the mid-1990s, Seven Up Pete sought to obtain state permits to begin mining operations, as required by Mont. Code Ann. § 82-4-335(1). App. 4-5. All told, Seven Up Pete invested approximately $70 million in the project. App. 4.

On November 3, 1998, the voters of Montana approved I-137. With its enactment, Montana became the only state to prohibit cyanide heap leaching to extract gold and silver. App. 5. Accordingly, the State of Montana could not approve the permits to allow Seven Up Pete to begin mining activities. App. 5-6. Because there were no other processes, besides open-pit mining and cyanide leaching, that would allow economically viable production of the gold and silver near Lincoln, Montana, Seven Up Pete's leases and property interests were rendered worthless. *Id.*

On April 11, 2000, Seven Up Pete filed suit in the U.S. District Court for the District of Montana alleging, *inter alia*, that I-137 effectuated a taking of their property interests without providing just compensation, as required by the Fifth and Fourteenth Amendments to the U.S. Constitution. App. 6. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 because the complaint raised federal questions under the Fifth Amendment Takings Clause and other federal constitutional provisions. Later that same day, as required under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), Seven Up Pete sought to exhaust state remedies by filing a state court action seeking just compensation under Montana law. *Id.* Pursuant to *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964), Seven Up Pete expressly advised the state district court that they "reserve[d] [their] federal claims" for their federal action, and were merely notifying the state court of their "federal claims so that Plaintiffs' state claims [could] be considered and adjudicated in light of those claims, and not for determination by [the state court] of [their] federal claims." *Id.* Thus, the federal district court, in granting a stay of the federal proceedings, found that Seven Up Pete had "properly complied with the *England* requirements" and that they, therefore, would be "entitled to return to federal court at the conclusion of the state court proceedings if it remains necessary to litigate their reserved federal claims." App. 163-64.

On December 9, 2002, the Montana State District Court granted summary judgment in favor of the State of Montana on the state takings claims. App. 85. On June 8, 2005, the Montana Supreme Court affirmed the decision below. App. 35. It held that Seven Up Pete's leases did not constitute a cognizable property interest under Montana law and, therefore, no taking could occur under Montana law or under federal law. *Id.* Seven Up Pete subsequently filed a petition for writ of certiorari to the U.S. Supreme Court, which was denied. *Seven Up Pete Venture v. Montana*, 546 U.S. 1170 (2006); App. 31.

Having fully exhausted their state court remedies, Seven Up Pete returned to federal court. The federal district court reopened the case, but, on April 11, 2006, dismissed Seven Up Pete's claims. The court held that the state defendants were entitled to immunity under the Eleventh Amendment to the U.S. Constitution. *Seven Up Pete Venture v. Schweitzer*, 2006 WL 1194088 (D.Mont. 2006); App. 19.[1]

---

[1] The district court noted that it was required to accord preclusive effect to the Montana Supreme Court decision, which purportedly had addressed the federal takings issues, even though those claims were reserved expressly for the federal court proceedings. App. 25-26 (citing *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2006)). Once the district court held that the Eleventh Amendment deprived it of jurisdiction, however, its subsequent musings were nothing more than *dicta*. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-101 (1998). Accordingly, the Ninth Circuit declined to analyze the matter of issue preclusion; instead, it based its decision solely on the Eleventh Amendment issue. App. 8 n.3; App. 18.

On April 21, 2008, the Ninth Circuit affirmed the decision of the federal district court, holding that the State of Montana defendants were immune, under the Eleventh Amendment, from federal takings claims. *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948 (9th Cir. 2008); App. 1. In so doing, the Ninth Circuit summarily deemed *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) inconsequential because it involved a suit against a county, rather than a state. App. 11-12. The Ninth Circuit then declined to analyze *Reich v. Collins*, 513 U.S. 106 (1994) in conjunction with this Court's subsequent decision in *Alden v. Maine*, 527 U.S. 706 (1999), and, as a result, concluded that sovereign immunity could bar suits in federal court that would not be barred if filed in state court. App. 13-17. In reaching this conclusion, the Ninth Circuit cited cases from five other circuits, only one of which was decided after *Reich* and *Alden*.[2] The Ninth Circuit also declined to apply the exception in *Ex parte Young*, 209 U.S. 123 (1908), because of the nature of relief sought. App. 17-18. This Petition followed.

---

[2] The Ninth Circuit relied on *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004); *John G. & Marie Stella Kenedy Mem'l Found. v. Mauro*, 21 F.3d 667 (5th Cir. 1994); *Robinson v. Ga. Dep't of Transp.*, 966 F.2d 637 (11th Cir. 1992); *Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31 (1st Cir. 1982); and *Garrett v. Illinois*, 612 F.2d 1038 (7th Cir. 1980). Notably, however, only *DLX, Inc.*, was decided after *Reich* and *Alden*.

REASONS FOR GRANTING THE PETITION

This Court has interpreted the Eleventh Amendment as, *inter alia*, a bar on private actions in federal court against state governments or state government officers in which the state treasury may be required to pay monetary damages. *See, e.g.*, *Alden*, 527 U.S. 706; *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). A private federal action against state officials for recovery of just compensation for the taking of private property pursuant to the Takings Clause, however, necessitates a different application of the Eleventh Amendment. By ignoring the unique nature of federal Takings Clause jurisprudence, the Ninth Circuit's holding cannot be reconciled with the text or the intent of the Constitution and conflicts with relevant decisions of this Court.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT REGARDING SOVEREIGN IMMUNITY AND THE ELEVENTH AMENDMENT.

A. The Ninth Circuit's Decision Conflicts With This Court's Fifth Amendment Analysis In *First English*.

This Court has explained that the Eleventh Amendment was based upon sovereign immunity principles. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("the Eleventh Amendment, and the principle

of state sovereignty which it embodies . . . ") (citing *Hans v. Louisiana*, 134 U.S. 1, 12-15 (1890)). Later, in *First English*, 482 U.S. 304, in this Court's only analysis of the interplay between the Takings Clause and sovereign immunity, this Court flatly rejected the notion that sovereign immunity could bar federal Takings Clause cases for "money damages against the government" because "the Constitution [] dictates the remedy for interference with property rights amounting to a taking." *Id.* at 316 n.9.

The Ninth Circuit dismissed this *First English* conclusion as *dicta* because *First English* dealt with a purported taking by a county, which, admittedly, does not enjoy the protections of Eleventh Amendment immunity. App. 11-12; *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). What is notable about the *First English* comment, though, is the issue this Court rejected and the rationale it employed.

In an *amicus curiae* brief by the United States in *First English*, the Solicitor General argued that the "just compensation" provision merely provides a prerequisite for a government taking; it is not, in and of itself, a self-executing remedy once the government has effectuated a taking. Brief for the United States as *Amicus Curiae* Supporting Appellee, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (brief located at 1986 WL 727420). The United States argued that this must be so because the Takings Clause of the Fifth Amendment originally applied only to the

federal government, and it was clear that the federal government enjoyed sovereign immunity from such suits. *Id.*

This Court directly addressed and rejected this argument. It concluded that the Takings Clause provides a self-executing remedy, irrespective of sovereign immunity concerns. *First English*, 482 U.S. 316 n.9. Notably, this Court did not reject the sovereign immunity argument on the grounds that, in *First English*, the defendant was a county to which sovereign immunity did not apply; instead, it considered and rejected the argument that any government that was protected by sovereign immunity could be shielded from Takings Clause claims for monetary damages. *Id.* By summarily dismissing *First English* as irrelevant *dicta*, rather than a well-reasoned determination of this Court, the Ninth Circuit's holding conflicts with a directly-applicable decision of this Court.

B. The Ninth Circuit's Decision Conflicts With This Court's Waiver Analysis, As Enunciated In *Fitzpatrick* And *Central Virginia Community College*.

This Court has held that, "if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." *See, e.g., Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 473 (1987) (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883)). Waiver

of Eleventh Amendment immunity is generally accomplished, however, "only where stated by the most express language. . . ." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (internal citation omitted).

Such a high standard notwithstanding, this Court has held that the Thirteenth and Fourteenth Amendments "were intended to be . . . limitations of the power of the States. . . . " *Ex parte Virginia,* 100 U.S. 339, 344-45 (1879). The Fourteenth Amendment specifically provides that "No *State* shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1 (emphasis added); App. 169. Thus, the "prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power." *Ex parte Virginia*, 100 U.S. at 346. Indeed, laws enacted to enforce the rights guaranteed in the Fourteenth Amendment are "no[t] invasion[s] of State sovereignty" because it was the states themselves that ratified the Fourteenth Amendment. *Id.*

Typically, § 5 of the Fourteenth Amendment, App. 170, which provides that "Congress shall have the power to enforce by appropriate legislation, the provisions of this article," constitutes the basis for such a limitation of state sovereignty, and laws expressly passed pursuant to § 5 may be interpreted as usurping Eleventh Amendment immunity. *Fitzpatrick*, 427 U.S. at 456. Consequently, this Court, in *Fitzpatrick*, held "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are

necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Id.*

Given that the Fourteenth Amendment was viewed generally as a limitation on state sovereignty, *see Ex parte Virginia*, 100 U.S. at 344-46, however, there is no reason to believe that § 5 provides the only basis for a waiver of Eleventh Amendment immunity. If the other clauses of the Fourteenth Amendment were to include a self-executing component, no statutory enactment would be necessary to override Eleventh Amendment immunity. In other words, to abrogate Eleventh Amendment immunity absent a statute enacted pursuant to § 5, the Fourteenth Amendment would have to include a right to recover just compensation from a state even without any statutory recognition.

The Fourteenth Amendment does, indeed, include such a self-executing component. The Fourteenth Amendment provides that "No *State* shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . " U.S. Const. amend. XIV, § 1 (emphasis added); App. 169. Although the Takings Clause of the Fifth Amendment originally applied only against the federal government, this Court has held that "[t]he Takings Clause of the Fifth Amendment, [is] applicable to the States through the [Due Process Clause of the] Fourteenth Amendment. . . . " *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (citing *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897)).

Because the Takings Clause of the Fifth Amendment is self-executing, "statutory recognition [is] not necessary," as such suits are "*founded upon the Constitution of the United States.*" *First English*, 482 U.S. at 315 (quoting *Jacobs v. United States*, 290 U.S. 12, 16 (1933)) (emphasis in *First English*). Because "claims for just compensation are grounded in the Constitution itself[,] . . . in the event of a taking, the compensation remedy is required by the Constitution." *First English*, 482 U.S. at 315-16 (citing *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984); *United States v. Causby*, 328 U.S. 256, 267 (1946); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304-06 (1923); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893)).

Thus, the Fourteenth Amendment, which was intended as a limitation on state sovereignty, includes, through incorporation, the Fifth Amendment's Takings Clause, which, as a result of its self-executing nature, provides the basis for abrogation of Eleventh Amendment immunity. In other words, no congressional enactment, pursuant to § 5 of the Fourteenth Amendment, is necessary to abrogate Eleventh Amendment immunity because the abrogation was included within the Constitution itself. By ratifying the Fourteenth Amendment, which incorporates the Fifth Amendment and applies its principles to the states, states waived their Eleventh Amendment immunity to claims premised on the Fifth Amendment Takings Clause.

This conclusion becomes obvious upon reflection on this Court's Eleventh Amendment jurisprudence. In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), this Court held that a non-self-executing constitutional clause, the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, provides the basis for sovereign immunity abrogation. This Clause gives Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." *Id.* Because the Bankruptcy Clause was intended as a limitation on state power, the states, upon adoption of the Clause and ratification of the Constitution, waived their immunity from federal suits premised on statutes subsequently enacted pursuant to the Bankruptcy Clause. *Central Virginia Community College v. Katz*, 546 U.S. at 379.

Likewise, the Fourteenth Amendment was intended as a limitation on the power of the states. *Ex parte Virginia*, 100 U.S. at 344-45. The Fourteenth Amendment, though, unlike the Bankruptcy Clause, does not require any congressional action to implicate the pre-existing sovereign immunity waiver. Instead, by applying the self-executing Takings Clause to the states, the Fourteenth Amendment implicated the waiver of sovereign immunity immediately upon its ratification. Thus, the case for a waiver of sovereign immunity in Takings Clause cases is even stronger than in bankruptcy cases. As a result, based on this Court's waiver jurisprudence, it is evident that, upon ratification of the Constitution in its entirety in 1889, Montana waived its sovereign immunity from suits premised upon the Fifth Amendment Takings Clause.

Moreover, the State of Montana's ratification of the Fourteenth Amendment is not merely a "constructive waiver" that this Court has held to be insufficient to override the Eleventh Amendment. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 676-688 (1999) (A state cannot constructively waive the Eleventh Amendment by engaging in an act that Congress previously has authorized federal courts to adjudicate.). Instead, it is an expressed waiver that occurred when Montana explicitly ratified the then-existing Constitution in its entirety, including the Fourteenth Amendment, as a prerequisite to admission to the Union. *See* Mont. Const. ordinance 1, § 5 (1889); Proclamation No. 7 of President Harrison, 26 Stat. 1551 (Nov. 8, 1889). By ignoring this Court's waiver analysis, the Ninth Circuit's decision conflicts with *Fitzpatrick* and *Central Virginia Community College*.

C. The Ninth Circuit's Decision Conflicts With This Court's Explanation In *Alden* That State Sovereign Immunity In State Court Is Analogous To State Sovereign Immunity In Federal Court.

This Court, in *Reich v. Collins*, 513 U.S. 106, held that a state action "in violation of the laws or Constitution of the United States . . . is itself in contravention of the Fourteenth Amendment the sovereign immunity States traditionally enjoy in their own courts notwithstanding." *Id.* at 109-10 (a state's

denial of post-deprivation remedies for unconstitutionally-collected taxes violates the self-executing Due Process Clause of the Fourteenth Amendment) (internal quotation omitted). Indeed, "[t]he constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." *Alden*, 527 U.S. at 754-55.

In *Alden*, a related but distinct case decided five years after *Reich*, this Court held that sovereign immunity principles prevented Congress, pursuant to its Article I powers, from subjecting nonconsenting States to private suits for damages in state courts. *Alden*, 527 U.S. at 712. This Court made a concerted effort to distinguish the holding in *Alden* from *Reich*: In *Reich*, the violation arose "from the Constitution itself; *Reich* does not speak to the power of *Congress* to subject States to suits in their own courts." *Alden*, 527 U.S. at 740 (emphasis added).

Thus, after *Reich* and *Alden*, it is evident that a state cannot invoke sovereign immunity to protect itself from suits in state court for federal constitutional violations; nonetheless, sovereign immunity does shield a nonconsenting state from damages suits against it in state court that are premised upon a violation of laws enacted by Congress, pursuant to Congress's Article I powers. Because Seven Up Pete's Takings Clause claims are premised on federal constitutional violations, the Ninth Circuit correctly applied the *Reich* rationale, rather than the *Alden* rationale, and held that sovereign immunity would

not shield Montana from federal takings claims brought in state court. App. 13-17.

Then, however, the Ninth Circuit took a wrong turn. It adopted a parenthetical phrase in *Reich* that explained that, although principles of sovereign immunity could not shield the state from federal constitutional claims in state court, the Eleventh Amendment would bar the same suit in federal court. App. 13 (citing *Reich*, 513 U.S. at 110). By natural implication, then, under *Reich*, the Eleventh Amendment provides immunity above and beyond what is provided under general sovereign immunity principles. This *dicta* in *Reich* either was modified or rejected completely by this Court in *Alden*:

> [T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather . . . the States' immunity from suit is a fundamental aspect of sovereignty which the States enjoyed before ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.

Alden, 527 U.S. at 713 (emphasis added).

Indeed, "[t]he Eleventh Amendment confirm[s] rather than establishe[s], sovereign immunity as a constitutional principle." *Id.* at 728-29. The principle of sovereign immunity is broad, and the Eleventh Amendment is merely one expression of that principle. *Id.* at 728 (citing *Idaho v. Coeur d'Alene Tribe of*

Idaho, 521 U.S. 261, 267-68 (1997)). Therefore, "States retain an analogous constitutional immunity from private suits in their own courts" as they do in federal court. *Alden*, 527 U.S. at 748. To be sure, the sovereign immunity principle "does not turn on the forum in which the suits were prosecuted but extends to state-court suits as well." *Id.* at 733 (discussing Congress's ability to abrogate sovereign immunity).

Because the Eleventh Amendment is a subset of, rather than a universal expression of, sovereign immunity, the Eleventh Amendment cannot possibly provide a greater shield from lawsuits than does the overarching principle of sovereign immunity. Quite simply, if general principles of sovereign immunity do not shield a state from a certain type of suits in state court, an aspect of sovereign immunity, as expressed by the Eleventh Amendment, cannot shield a state from the same suit in federal court.

Although *Alden* implicitly rejected the parenthetical *dicta* in *Reich*, it, notably, did not overrule the holding in *Reich* that suits against states derived from violations of constitutional amendments may not be shielded by sovereign immunity in state court. In fact, *Alden* expressly provided that sovereign immunity could be "altered by . . . certain constitutional Amendments." *Alden*, 527 U.S. at 713. Consistent with *Alden*, Seven Up Pete bases its claims on Amendments V and XIV, which override principles of sovereign immunity. Thus, the combined rule of law to be gleaned from *Reich* and *Alden* is that suits against states, premised upon a violation of a

constitutional amendment, such as the Fifth Amendment and its Takings Clause, are not shielded by sovereign immunity in state courts, and, because sovereign immunity in federal court is "analogous" to sovereign immunity in state court, sovereign immunity (a subset of which is expressed in the Eleventh Amendment) does not shield a state from suits premised upon a violation of the same constitutional amendment in federal court.

The Ninth Circuit correctly applied *Reich* to conclude that sovereign immunity could not shield Montana from a federal taking claim in state court; however, it wrongly ignored this Court's decision in *Alden*, decided subsequent to *Reich*, that state sovereign immunity in state court is "analogous" to sovereign immunity in federal court. App. 16-17. By failing to analyze this Court's holdings in *Reich* in conjunction with *Alden*, the Ninth Circuit's decision conflicts with the combined holdings of those cases.

II. THE NINTH CIRCUIT FAILED TO APPLY A STRICT TEXTUAL INTERPRETATION OF THE ELEVENTH AMENDMENT.

A. This Court Interprets The Constitution Based On Its Text.

Interpretation based on the original understanding of the text is the most intrinsically sound method of construction. *See, e.g., Granholm v. Heald*, 544 U.S. 460, 516 (2005) (Thomas, J., dissenting) ("[T]he text of our Constitution is the best guide to its meaning.");

City of Boerne v. P.F. Flores, 521 U.S. 507, 519 (1997) ("In assessing the breadth of § 5's [of the Fourteenth Amendment] enforcement power, we begin with its text."); *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 63 (1936) (finding no need to discuss the history of the Twenty-First Amendment, subsequent Court rulings interpreting the amendment, or statutes passed in reliance on the amendment because the language of the amendment is clear). Thus, when interpreting the Constitution, "[t]he words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). Specifically, "the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification." *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993) (Scalia, J., concurring); *see also South Carolina v. U.S.*, 199 U.S. 437, 448 (1905) ("The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.").

As Justice Benjamin Curtis explained:

> When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the

> Constitution is according to their own views of what it ought to mean.

Dred Scott v. Sandford, 60 U.S. 393 (1857) (Curtis, J., dissenting). More recently, Justice Thomas echoed these same sentiments in discussing the purpose of a strict construction of the text:

> First, it deprives modern judges of the opportunity to write their own preferences into the Constitution by tethering their analysis to the understanding of those who drafted and ratified the text. Second, it places the authority for creating legal rules in the hands of the people and their representatives rather than in the hands of the nonelected, unaccountable federal judiciary. Thus, the Constitution means not what the Court says it means, but what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean. Third, it recognizes the basic principle of a written Constitution. We as a nation adopted a written Constitution precisely because it has a fixed meaning that does not change.

Clarence Thomas, *Judging*, 45 U. Kan. L. Rev. 1, 5 (1996).

B. The Ninth Circuit Interpreted The Eleventh Amendment In A Manner Contrary To Its Text.

The Ninth Circuit's holding that the Eleventh Amendment immunizes states from suits in federal

court for takings claims under the Fifth Amendment of the Constitution, App. 18, is contrary to the text of the Eleventh Amendment, which provides, in its entirety:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI; App. 168.

To be sure, "the text of the [Eleventh] Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts. . . . " *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996); *see also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31 (1989) (Scalia, J., dissenting) ("If this text were intended as a comprehensive description of state sovereign immunity in federal courts – that is, if there were no state sovereign immunity beyond its precise terms – then it would unquestionably be most reasonable to interpret it as providing immunity only when the *sole basis* of federal jurisdiction is the diversity of citizenship that it describes . . . "). In actuality, this Court's sovereign immunity jurisprudence is based on what Justice Stevens regards as "the second Eleventh Amendment, which has its source in judge-made common law, rather than constitutional text." *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 741 (2003) (Stevens,

J., concurring) (citing *Pennsylvania v. Union Gas Co.*, 491 U.S. at 23 (Stevens, J., concurring)).

A comprehensive analysis of this issue has already been written by various justices, *see, e.g.*, *Seminole Tribe*, 517 U.S. at 100-85 (Souter, J., dissenting); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting), so a mere summary of the argument will be presented here. It is sufficient to note, however, that in each of these sharply divided cases, the five-justice majority departed from a strict textual interpretation of the Eleventh Amendment, whereas the dissent argued in favor of a more textually based construction, as summarized below.[3]

Article III § 2, of the Constitution provides:

> *The judicial Power shall extend to all Cases, in Law and Equity*, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; *between a State and Citizens of another State*;

---

[3] The issue in this case is not one of federalism; the Eleventh Amendment exists as a fixture in the Constitution, irrespective of this Court's interpretation of it. Instead, the issue in this case is one of constitutional interpretation.

> between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, *and between a State*, or the Citizens thereof, *and foreign States, Citizens or Subjects.*

U.S. Const. art. III, § 2, cl. 1 (emphasis added); App. 166.

It is clear from this text that the text of the Eleventh Amendment eliminates two specific bases for federal judicial power that had been granted originally by Article III, § 2: (1) diversity jurisdiction in a suit "commenced or prosecuted against one of the United States by Citizens of another State," and (2) diversity jurisdiction in a suit "commenced or prosecuted against one of the United States . . . by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI; App. 168. Notably, however, the Eleventh Amendment does not remove from the federal judicial power cases "arising under this Constitution." U.S. Const. art. III, § 2; App. 166.

It is also evident that the Framers did not express broad concepts of sovereign immunity in the text of the Eleventh Amendment. Nonetheless, had they so desired, it would not have been difficult. Indeed, the original draft of what became the Eleventh Amendment, which was introduced in the House of Representatives on February 19, 1793, provided:

> [N]o State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the

> authority of the United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States.

Atascadero State Hospital, 473 U.S. at 283-84 (Brennan, J., dissenting) (citing 1 C. Warren, *The Supreme Court in the United States History* 101 (rev. ed. 1937)).

Unquestionably, this resolution, had it become a constitutional amendment, would have barred from federal court all suits against a state, regardless of their basis. Instead, though, the Eleventh Amendment was ratified with significantly different text – text that leaves the Article III federal jurisdiction for suits "arising under this Constitution" intact. Indeed, as Justice Marshall explained a mere 26 years after ratification of the Eleventh Amendment, "a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case." *Cohens v. Virginia*, 19 U.S. 264, 383 (1821). Justice Marshall explained that, in spite of the state interests protected by the Eleventh Amendment, "no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its Courts, the constitution and laws from active violation." *Id.* at 407.

Moreover, no other provision of the Constitution either explicitly provides for, or adopts the common

law principle of sovereign immunity that would, in theory, immunize states from all suits in federal court. Indeed, "the 1787 draft Constitution contained no provision for adopting the common law at all." *Seminole Tribe*, 517 U.S. at 137 (Souter, J., dissenting). "This omission stood in sharp contrast to the state constitutions then extant, virtually all of which contained explicit provision dealing with common-law reception." *Id.* (citing provisions in many of the original states' constitutions in which the common law was adopted explicitly whenever it is not in conflict with state statutes or the constitution).

In short, the text of the Eleventh Amendment prohibits suits against a state in federal court only when the suit is based on particular types of diversity jurisdiction. The text of the Amendment clearly does not prohibit federal suits against a state for a claim "arising under this Constitution." U.S. Const. art. III, § 2; App. 166. Seven Up Pete's Takings Clause claim, brought against the State of Montana, "aris[es] under this Constitution." More specifically, the claim arises under the Fifth Amendment, which is applied to the states through the Fourteenth Amendment to the Constitution. The text of the Eleventh Amendment does not prohibit such a suit.

The Ninth Circuit, relying on this Court's Eleventh Amendment jurisprudence, accepted the notion that the Eleventh Amendment bars federal suits, premised on a federal question, against a state. App. 13-17. This case presents a prime opportunity for this Court to reject any construction of the Eleventh

Amendment not wholly in accord with its text, and to settle conclusively the issues that sharply divided this Court in *Atascadero State Hospital* and *Seminole Tribe*.

III. THE NINTH CIRCUIT'S DECISION FRUSTRATES THE FRAMERS' INTENT TO PROTECT INDIVIDUALS FROM STATE COURT BIAS.

The Framers understood that the exclusive availability of state courts to hear federal constitutional claims against states is insufficient to yield substantial justice to aggrieved parties:

> . . . the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens . . . [because,] having no local attachments, [the national judiciary] will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.
>
> * * *
>
> The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable

> weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens. And it ought to have the same operation in regard to some cases between citizens of the same State.

The Federalist No. 80, at 502-503 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

As a result of these concerns, Article III, § 2, of the U.S. Constitution, which provides the basis for federal courts to hear state-law claims when the plaintiff and defendant are from diverse states, "is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias." *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945); *see also Bank of U.S. v. Deveaux*, 9 U.S. 61, 87 (1809) ("the constitution itself either entertains apprehensions [of local bias] or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."). These fears of local biases are not antiquated concerns of a bygone era. Modern studies indicate that fears of local biases in state courts persist strongly. Neal Miller, *An Empirical Study of Forum Choice in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 400-23 (1992).

Typically, state court local biases are discussed in the context of favoring an in-state citizen or corporation in a dispute against an out-of-state citizen or

corporation; however, in Takings Clause cases, the concern for local biases is even greater. If a plaintiff in a federal takings case prevails against a state, the state will be required to pay "just compensation," thereby reducing the amount of money in the state treasury. Because state courts are often funded by the state treasury, which is typically controlled by the state legislature, a natural incentive exists to be biased in favor of the state at the expense of the aggrieved plaintiff. As Justice Marshall explained, "[i]t would be hazarding too much to assert that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many States the judges are dependent for office and for salary on the will of the legislature." *Cohens*, 19 U.S. at 386-87. Federal courts, on the other hand, are funded by entirely separate sources, thus, have no undue incentive to find in favor of a state in federal takings claims.

Therefore, to recognize of Hamilton's self-evident principle that "No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias," *The Federalist* No. 80, at 502, federal courts must be available to hear suits against states premised on the Takings Clause of the Fifth Amendment.

Additionally, "federal judges appointed for life are more likely to enforce the constitutional rights of unpopular minorities than elected state judges." *England*, 375 U.S. at 427 (Douglas, J., concurring).

Therefore, the availability of state courts, presided over by elected state judges, is not an adequate substitute for the availability of federal courts to remedy infringements of federal constitutional rights, such as those Seven Up Pete seeks to have vindicated.

The Ninth Circuit decision interprets the Eleventh Amendment in a manner that undermines one of the Framers' constitutional intents. In the absence of review, this Court would implicitly authorize states to ignore the property rights guarantees of the Fifth and Fourteenth Amendments, subject only to the biases of state court judges who lack life tenure. As a result, these issues present important federal questions of national significance that should be settled by this Court.

IV. THIS COURT SHOULD TAKE THE OPPORTUNITY TO EXTEND THE *EX PARTE YOUNG* RATIONALE TO SUITS IN WHICH STATES ARE ALLEGED TO HAVE VIOLATED THE CONSTITUTION.

To best protect against state court bias, this Court should interpret the Constitution in a manner that allows for suits against states for constitutional violations to be brought in federal court. This could be done without radically departing from this Court's own Eleventh Amendment jurisprudence.

In *Ex parte Young*, this Court established the principle that the Eleventh Amendment does not

preclude suits against state officers, in their individual capacity, for injunctive relief. *Ex parte Young*, 209 U.S. 123. Though this exception is not directly applicable here because, *inter alia*, "just compensation" involves monetary damages, rather than injunctive relief, *see, e.g.*, *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710-11 (1999), the rationale of *Ex parte Young* could be applied and the holding of that case could be extended easily to situations in which a state infringes upon a constitutionally-protected right.

In *Ex parte Young*, this Court recognized that, for the "Constitution to remain the supreme law of the land[,]" it must be possible to commence lawsuits against states irrespective of sovereign immunity principles. *Alden*, 527 U.S. at 747-48 (citing *Ex parte Young*, 209 U.S. 123; *General Oil Co. v. Crain*, 209 U.S. 211 (1908)). These concerns, in part, led this Court to explain how such a lawsuit could both compel compliance with the Constitution and preserve Eleventh Amendment sovereign immunity principles:

> The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting to use the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce

> be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Ex parte Young, 209 U.S. at 159-60.

A similar rationale should be applied in this case. The Constitution provides that "New States may be admitted by the Congress into this Union . . . " U.S. Const. art. IV, § 3. In 1889, Congress laid the groundwork to do just that:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

25 Stat. 676 (1889). As a prerequisite to admission, Congress required that the proposed new states "adopt the Constitution of the United States . . . " *Id.* At that time, the Constitution of the United States

already included both the Fifth and Fourteenth Amendments.

Thus, Montana's recognition as a state was premised on its adoption of the federal Constitution. *See* Proclamation No. 7 of President Harrison, 26 Stat. 1551 (Nov. 8, 1889). By taking Seven Up Pete's private property while denying just compensation, Respondents violated federal constitutional principles upon which the State of Montana's admission to the union was premised. Therefore, this Court should apply the *Ex parte Young* rationale to strip the State of Montana of its state-based sovereignty and its related immunities and privileges whenever it is alleged to have taken "private property" for "public use" without providing "just compensation."

CONCLUSION

Because the ruling of the U.S. Court of Appeals for the Ninth Circuit conflicts with the text of the Constitution and decisions of this Court, and because it presents important issues of federal law that should be resolved by this Court, certiorari should be granted.

Respectfully submitted:

WILLIAM PERRY PENDLEY*
*Counsel of Record
JOEL M. SPECTOR
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

ALAN L. JOSCELYN
GOUGH, SHANAHAN, JOHNSON & WATERMAN
P.O. Box 1715
Helena, Montana 59624
(406) 442-8560

Attorneys for Petitioners

Submitted July 21, 2008

INDEX TO APPENDIX

Page

Seven Up Pete Venture v. Schweitzer, Opinion, No. 06-35384 (9th Cir. April 21, 2008) ..... App. 1

Seven Up Pete Venture v. Schweitzer, Order and Judgment, No. CV 00-13-H-CCL (D.Mont. April 11, 2006) ..... App. 19

Seven Up Pete Venture v. Montana, Order Denying Petition for Writ of Certiorari, No. 05-588 (U.S. Feb. 21, 2006) ..... App. 31

Seven Up Pete Venture v. Schweitzer, Order, No. CV 00-13-H-CCL (D.Mont. Jan. 30, 2006) ..... App. 32

Seven Up Pete Venture v. State of Montana, No. 03-154 (Mont. June 8, 2005) ..... App. 35

Seven Up Pete Venture v. Racicot, Order, No. CV 00-13-H-CCL (D.Mont. March 25, 2004). App. 83

Seven Up Pete Joint Venture v. State of Montana, Order, No. BVD 2000-250 (D.Mont. Dec. 9, 2002) ..... App. 85

Seven Up Pete Venture v. Montana, Order, No. BDV 2000-250 (Mont. 1st Judicial Dist., Lewis and Clark County, Nov. 1, 2001) ..... App. 116

Seven Up Pete Venture v. Racicot, Order, No. CV 00-13-H-CCL (D.Mont. Sept. 4, 2001)... App. 145

U.S. Const. art. III, § 2, cl. 1 ..... App. 166

U.S. Const. amend. V ..... App. 167

U.S. Const. amend. XI ..... App. 168

U.S. Const. amend. XIV ..... App. 169

Mont. Code § 82-4-390 ..... App. 171

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEVEN UP PETE VENTURE, an Arizona general partnership dba Seven up Pete Joint Venture; CANYON RESOURCES CORPORATION, a Delaware corporation; JEAN MUIR; IRENE HUNTER, Doctor; DAVID MUIR; ALICE CANFIELD; TONY PALAORO; JUNE E. ROTHE-BARNESTON; AMAZON MINING COMPANY, a Montana partnership; PAUL ANTONIOLI; STEPHEN ANTONIOLI; JAMES E. HOSKINS,

Plaintiffs-Appellants

v.

BRIAN SCHWEITZER, Governor of the State of Montana; RICHARD OPPER, Director of the Montana Department of Environmental Quality,

Defendants-Appellees.

No. 06-35384

D.C. No. CV-00-00013-CCL

OPINION

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted
November 7, 2007 – Seattle, Washington

Filed April 21, 2008

Before: William C. Canby, Jr., Susan P. Graber, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Canby

COUNSEL

Sean Connelly, Reilly, Pozner & Connelly, LLP, Denver, Colorado, for the plaintiffs-appellants.

Anthony Johnstone, Assistant Attorney General, Helena, Montana, for the defendants-appellees.

OPINION

CANBY, Circuit Judge:

The primary question before us is whether the Eleventh Amendment precludes federal jurisdiction over an action seeking compensation under the Fifth and Fourteenth Amendments for a taking of property by a State.

The factual setting of this case is simple enough; the procedural context is more complicated. Seven Up Pete Venture ("the Venture") and other plaintiffs acquired leases of Montana state property for the

purpose of mining gold, silver and other trace minerals.[1] Subsequently, voters of Montana enacted Initiative 137 ("I-137"), which banned open-pit mining for gold or silver by the cyanide heap leaching process. The Venture then brought this reverse condemnation action in federal district court against the Governor of Montana and the Director of the Montana Department of Environmental Quality in their official capacities. The Venture contended that I-137 effected a regulatory taking of their property, for which the State of Montana must pay just compensation under the Fifth and Fourteenth Amendments of the United States Constitution. At the same time, the Venture brought a reverse condemnation action in Montana state court. The Venture then obtained a stay of the federal proceedings pending resolution of the state claims. After the Montana Supreme Court rejected the Venture's claims, the district court dismissed the federal takings claims under the Eleventh Amendment and, in the alternative, under the doctrine of issue preclusion. The Venture now appeals that dismissal.

We join a number of our sister circuits and hold that the Eleventh Amendment bars a reverse condemnation action brought in federal court against state officers in their official capacities. We therefore affirm the district court's dismissal of the Venture's

---

[1] Except in the "Factual History" section of this opinion, all references to "the Venture" include the other plaintiffs as well as Seven Up Pete Venture.

takings claims on that ground without reaching the question of issue preclusion.

BACKGROUND

I. Factual History[2]

In 1991, the Venture acquired six leaseholds ("the Mineral Leases") of state-owned mineral estates in the vicinity of Lincoln, Montana. The lands encompassed by the Mineral Leases comprise an area known as the "McDonald Project." According to feasibility studies, the McDonald Project contains more than 9 million ounces of gold and 20 million ounces of silver. Approximately half of these minerals could be recovered profitably through open-pit extraction combined with cyanide leaching of the ore. In addition to its interest in the McDonald Project, the Venture owns surface leases as well as other surface and mineral interests in two other areas also located east of Lincoln, Montana. These areas are designated as "Keep Cool Prospect" and "Seven Up Pete Project." The remaining plaintiffs own surface or mineral interests in the general vicinity of Lincoln, Montana.

Throughout the mid-1990s, the Venture and the State of Montana engaged in discussions regarding the environmental impact and viability of mining in

---

[2] Because the Montana Supreme Court recited the facts underlying this litigation in some detail in a published opinion, we provide only a brief summary of the events. *See Seven Up Pete Venture v. State*, 114 P.3d 1009 (Mont. 2005).

the McDonald Project. Neither the Venture nor any other plaintiff ever obtained a permit to begin mining operations, as required by Montana Code Annotated section 82-4-335(1), and no mining has in fact taken place to date in the Project.

In November 1998, Montana became the first state to prohibit open-pit mining using cyanide heap leaching. It did so by passing ballot initiative I-137, which, as codified, provides:

> (1) Open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore-processing reagents is prohibited except as described in subsection (2).
>
> (2) A mine described in this section operating on November 3, 1998, may continue operating under its existing operating permit or any amended permit that is necessary for the continued operation of the mine.

Mont. Code Ann. § 82-4-390.

According to the complaint, there are no gold or silver recovery processes other than open-pit mining and cyanide leaching that will allow economically viable production of the gold and silver in the McDonald Project. In late 1999, the Montana Department of Environmental Quality informed the Venture that, in light of the passage of I-137, it had halted its review of the Venture's pending application for a mining permit. The Montana Department of Natural Resources and Conservation later informed the Venture that the six Mineral Leases terminated

of their own accord due to the Venture's failure to "diligently pursue acquisition of a permit under Montana's Metal Mine Reclamation Act." *Seven Up Pete Venture*, 114 P.3d at 1015.

II. Procedural History

In April 2000, the Venture filed a complaint in federal court alleging, among other things, that I-137 worked a taking of their property without just compensation in violation of the Fifth and Fourteenth Amendments. On the same day, the Venture also filed a complaint in state court, which alleged, among other things, that I-137 effectuated a regulatory taking of its property rights without just compensation under Montana law.

In the state complaint, the Venture advised the court that it "reserve[d] [its] federal claims" for a separate federal action, but was notifying the state court of its "federal claims so that Plaintiffs' state claims may be considered and adjudicated in light of those claims, and not for determination by [the state] Court of [its] federal claims."

The federal district court dismissed the federal Fifth Amendment claim without prejudice on the ground that the suit for compensation was not ripe under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), because the Venture had not finished pursuing the procedures Montana provides for obtaining just compensation. The district court

also concluded that the Venture had preserved its right, pursuant to *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964), to "return to federal court at the conclusion of the state court proceedings if it remains necessary to litigate their reserved federal claims." Accordingly, the district court dismissed the Venture's taking claims without prejudice and granted its motion to stay the case pending resolution of the state court proceedings.

The Montana trial court subsequently granted summary judgment in favor of the state in the state court proceedings, and the Montana Supreme Court affirmed. The Montana Supreme Court held that the Venture was not entitled to just compensation because "[t]he guarantees of the Fifth and Fourteenth Amendments apply only when a constitutionally protected property interest is at stake." *Seven Up Pete Venture,* 114 P.3d at 1017 (alterations and internal quotation marks omitted). The Court reasoned that the Venture's "'opportunity' to seek a permit, which required convincing the State that this cyanide leaching project was appropriate, did not constitute a property right. The State had wide discretion to reject the Venture's permit application, even without the enactment of I-137." *Id.* at 1019.

The United States Supreme Court denied the Venture's petition for certiorari to review the state court judgment. The Venture timely notified the district court and filed a motion to reopen the case and reinstate the federal takings counts. The district court reopened the case but dismissed the Venture's

takings claims with prejudice. It held that the Eleventh Amendment barred the Venture's takings claims because they seek monetary relief against state officials in their official capacities. In the alternative, the district court held that it was required to accord issue-preclusive effect to the Montana Supreme Court's decision.[3] The Venture appeals both grounds for dismissal.

DISCUSSION

The Eleventh Amendment has been authoritatively construed to deprive federal courts of jurisdiction over suits by private parties against unconsenting States.[4] *See Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996). This jurisdictional bar remains effective, if a bit less absolute, in cases like this where state officials, instead of the State itself, are the subjects of suit. Generally speaking, "a suit [brought] against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no

---

[3] Although the district court had earlier observed that the Venture had preserved its right under *England* to return to federal court for adjudication of the federal constitutional issues, the court held that the intervening Supreme Court decision in *San Remo Hotel L.P. v. City & County of San Francisco*, 545 U.S. 323, 340-48 (2005), required the district court to give issue-preclusive effect to the Montana decision.

[4] "Immunity under the Eleventh Amendment is a question of law that we review de novo." *Yakama Indian Nation v. Wash. Dep't. of Revenue*, 176 F.3d 1241, 1245 (9th Cir. 1999).

different from a suit against the State itself." *Will v. Mich. Dep't. of State Police,* 491 U.S. 58, 71 (1989) (citation omitted). If, however, the plaintiffs seek prospective injunctive relief against the state official for a violation of federal law, the Eleventh Amendment does not bar the action. *Ex parte Young,* 209 U.S. 123 (1908); *Edelman v. Jordan,* 415 U.S. 651, 664 (1974).

These general principles guide our analysis of the two issues that we decide in this case: 1) whether the Takings Clause occupies a unique place among constitutional protections in that, by virtue of its built-in remedy of just compensation, it overrides Eleventh Amendment immunity and 2) if not, whether the doctrine of *Ex parte Young* applies to permit this suit against the state officials. Before turning to the merits of the first issue, we satisfy ourselves that this court has not already considered and decided it.

I. *Broughton* and *Stare Decisis*

This court upheld the dismissal of a reverse condemnation action on Eleventh Amendment grounds in *Broughton Lumber Co. v. Columbia River Gorge Comm'n,* 975 F.2d 616, 620 (9th Cir. 1992). One might well assume that *Broughton* thus ends the matter and controls this case, but *Broughton* was directed at a different argument. In *Broughton,* the plaintiff pursued a reverse condemnation action in federal court alleging that Washington and Oregon effected an unconstitutional regulatory taking of its

property by failing to issue a land use permit. *Id.* at 618. The plaintiff's argument assumed that the Eleventh Amendment ordinarily applied in reverse condemnations actions, but asserted that Congress had abrogated the immunity of Washington and Oregon in the statute approving the Columbia River Gorge Compact. *Id.* at 619. The court found no such abrogation in the statute, and accordingly held the suit to be barred by the Eleventh Amendment. *Id.* at 619-20. The argument presented in today's case – that the self-executing nature of the Takings Clause itself defeats Eleventh Amendment immunity – was neither raised nor discussed.

Because *Broughton* did not directly address the latter issue, it does not control our decision. It is true that "where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *United States v. Johnson,* 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (per curiam). But *Broughton* involved no such reasoned consideration of the issue before us. Reconsideration of an issue may be appropriate "where the later panel is convinced that the earlier panel did not make a deliberate decision to adopt the rule of law it announced." *Id.* at 915. That is the situation here: we are convinced that *Broughton* made no deliberate decision rejecting the proposition that the self-executing nature of the Takings Clause overcame Eleventh Amendment

immunity. In deciding that question today, we are not constrained by *Broughton*.[5]

II. Self-Execution and the Eleventh Amendment

A. Self-Execution

The Supreme Court has long recognized that the just compensation clause of the Fifth Amendment is self-executing: "'the right to recover just compensation . . . [i]s guaranteed by the Constitution'" and "'[s]tatutory recognition [i]s not necessary.'" *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987) (emphasis omitted) (quoting *Jacobs v. United States,* 290 U.S. 13, 16 (1933)). From this fact, the Venture argues that the constitutional right to compensation overcomes the state's Eleventh Amendment immunity. We reject this contention; we conclude that the constitutionally grounded self-executing nature of the Takings Clause does not alter the conventional application of the Eleventh Amendment.

The Supreme Court's reverse condemnation cases have not spoken directly to our question. Neither

---

[5] At least two cases decided since *Broughton* contained dicta suggesting that it was an open question in this circuit whether reverse condemnation actions could be brought against an unconsenting State in federal court. *See Spoklie v. Montana,* 411 F.3d 1051, 1058 (9th Cir. 2005); *Taylor v. Westly,* 402 F.3d 924, 936 (9th Cir. 2005).

First English, a suit against a county, nor *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), a suit against a municipality, controls the Eleventh Amendment analysis, for both cases involved state entities not protected by the Amendment. *See, e.g., Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 & n.19 (1979) ("[T]he Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'").[6] In sum, *First English* expounds the self-executing character of the Takings Clause and the resulting obligation by the states to provide a specific remedy for takings in their own courts, but does not directly address its interplay with the Eleventh Amendment. *See* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash. L. Rev. 1067, 1072-80 (2001). This is the issue to which we now turn.

---

[6] Unsurprisingly, then, the *First English* Court did not place any analytical weight on sovereign immunity, mentioning the term only once and, even then, only to paraphrase the government's argument. *First English*, 482 U.S. at 316 n.9 ("The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision." (citation omitted)).

B. Eleventh Amendment and Sovereign Immunity

The Supreme Court addressed the interplay of sovereign immunity and another "self-executing" constitutional provision in *Reich v. Collins,* 513 U.S. 106 (1994), a case addressing the remedy required under the Due Process Clause for unconstitutionally levied taxes. The Court concluded that a *state court* could not wholly deny a remedy, stating that "'a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment,' the sovereign immunity States traditionally enjoy in their own courts notwithstanding." *Id.* at 109-10 (quoting *Carpenter v. Shaw,* 280 U.S. 363, 369 (1930)). The Court also observed parenthetically that, although the State could not invoke its sovereign immunity to avoid refunding an unconstitutional tax, the Eleventh Amendment nevertheless ordinarily barred such actions from *federal court. Id.* at 110. If sovereign immunity may not stand in the way of recovery in state court for unconstitutionally levied taxes because of the "self-executing" character of the Due Process right at stake, it follows that the state courts must also be available to adjudicate claims brought under the federal Takings Clause, which is also self-executing. And, as *Reich* states, this constitutionally enforced remedy against the States in state courts can comfortably co-exist with the Eleventh Amendment

immunity of the States from similar actions in federal court.

It is not surprising, then, that every court of appeals to have faced this question has expressly or implicitly applied the *Reich* rationale and held that the Eleventh Amendment bars Fifth Amendment reverse condemnation claims brought in federal district court. *See DLX, Inc. v. Kentucky,* 381 F.3d 511, 526-28 (6th Cir. 2004) ("[The State] enjoys sovereign immunity in the federal courts from [a] federal takings claim. . . ."); *John G. & Marie Stella Kenedy Mem'l Found. v. Mauro,* 21 F.3d 667, 674 (5th Cir. 1994) ("[A] Fifth Amendment inverse condemnation claim brought directly against the State . . . is . . . barred by the Eleventh Amendment."); *Robinson v. Ga. Dep't of Transp.,* 966 F.2d 637, 640 (11th Cir. 1992) (same); *Citadel Corp. v. Puerto Rico Highway Auth.,* 695 F.2d 31, 33 n.4 (1st Cir. 1982) (per curiam) (same); *Garrett v. Illinois,* 612 F.2d 1038, 1040 (7th Cir. 1980) (same). At least one commentator has agreed. *See* Richard H. Seamon, *supra,* at 1080-87.[7]

There is one additional wrinkle that must be added to the analysis, however. Five years after its

---

[7] Some earlier articles, written before the Supreme Court's decision in *Reich,* took a different view. *See* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity,* 98 Yale L.J. 1, 115 n.454 (1988); Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity,* 68 B.U. L. Rev. 277, 338-39 (1988).

decision in *Reich,* the Supreme Court decided *Alden v. Maine,* 527 U.S. 706 (1999). *Alden* held that the immunity of the States from suit without their consent was a fundamental aspect of sovereignty, which the States enjoyed before the adoption of the Constitution and retained thereafter "except as altered by the plan of the [Constitutional] Convention or certain constitutional Amendments." *Id.* at 713. Accordingly, Congress lacked the power under Article I of the Constitution to enact legislation subjecting the States to suit *in state courts. See id.* at 712. The Eleventh Amendment was simply a recognition of a two-part presupposition underlying the Constitution: (1) that each State is sovereign, and (2) that immunity from suit without the State's consent is inherent in sovereignty. *Id.* at 729.

From this formulation, the Venture draws some interesting arguments. First, the Venture assumes, justifiably enough, that there must be some forum in which the self-executing constitutional guarantee of just compensation for taking of property may be enforced. Thus, the Takings Clause must be capable of overcoming State sovereignty. *Alden,* however, makes it clear that Eleventh Amendment immunity is not unique, but is simply one expression of the total sovereign immunity of the States, applicable equally in federal and state court. Therefore, the Venture reasons, the self-executing dominance of the Takings Clause over State immunity applies equally in state and federal court.

We decline to adopt the Venture's "forum-neutral" conception of sovereign immunity for several reasons. First, although the Court in *Alden* viewed the Eleventh Amendment as a recognition of, rather than the origin of, sovereign immunity of the States, it nowhere commanded that the immunity be treated exactly the same for all purposes in both federal and state courts. It certainly did not purport to repudiate the command of the Eleventh Amendment precluding suits by private parties against unconsenting States in federal court. Moreover, the Court discussed *Reich* with approval, noting that the remedy against the State in *Reich* arose "from the Constitution itself; *Reich* does not speak to the power of Congress to subject States to suits in their own courts." *Alden*, 527 U.S. at 740. Nothing in this passage suggests or requires a change in the regime addressed in *Reich:* that the State may be sued in its own courts (but not in federal court) for damages arising from violation of a self-executing constitutional clause.

We therefore conclude that the Eleventh Amendment bars reverse condemnation actions brought in federal court against state officials in their official capacities.[8] In reaching this conclusion, we join the only sister circuit to have addressed the interplay of the Takings Clause and the Eleventh

---

[8] The Venture does not contend that the Montana state courts have failed to provide adequate procedures to adjudicate its just compensation claim.

Amendment since *Alden*. *See DLX, Inc.*, 381 F.3d at 528 (quoting *Alden*, 527 U.S. at 712).

III. Applicability of *Ex parte Young*

As its last resort, the Venture contends that the strictures of the Eleventh Amendment may be avoided by viewing its suit as one seeking injunctive relief against state officers to force them to adhere to the Constitution, as in *Ex Parte Young*. The applicability of the *Ex parte Young* exception turns on whether federal takings actions are properly characterized as seeking prospective or retrospective relief. A remedy for past injury, even if it purports to be an injunction against state officers requiring the future payment of money, is barred because relief "inevitably come[s] from the general revenues of the State . . . , and thus . . . resembles far more closely [a] monetary award against the State itself," which is forbidden under the Eleventh Amendment. *Edelman*, 415 U.S. at 665. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need conduct only a 'straightforward inquiry into whether the complaint [1)] alleges an ongoing violation of federal law and [2)] seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (alteration omitted) (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in judgment)).

It is impossible to characterize the relief sought by the Venture as prospective. A reverse condemnation action seeks, "in a strict sense[,] . . . not just compensation per se but rather damages for the unconstitutional denial of such compensation." *Del Monte Dunes,* 526 U.S. at 710. From a remedial perspective, then, "just compensation" is on all fours with traditional monetary damages, which are the quintessential form of retrospective relief. Thus, reverse condemnation actions cannot qualify as claims for prospective relief, and *Ex parte Young* consequently does not apply.

CONCLUSION

The Eleventh Amendment bars the Venture's reverse condemnation action brought in federal court against Montana's officials in their official capacities. We affirm the district court's dismissal of the Venture's action on this ground and do not reach the question of issue preclusion.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

SEVEN-UP PETE VENTURE, an Arizona partnership, d/b/a SEVEN-UP PETE JOINT VENTURE; CANYON RESOURCES CORPORATION, a Delaware Corporation; JEAN MUIR; DR. IRENE HUNTER; DAVID MUIR; ALICE CANFIELD; TONY PALAORO; JUNE E. ROTHE-BARNESON; AMAZON MINING COMPANY, a Montana Partnership; PAUL ANTONIOLI; STEPHEN ANTONIOLI; and JAMES E. HOSKINS,

Plaintiffs,

vs.

BRIAN SCHWEITZER, Governor of the State of Montana, and RICHARD OPPER, Director of the Montana Department of Environmental Quality,

Defendants.

CV 00-13-H-CCL

ORDER

(Filed Apr. 11, 2006)

* * *

Before the Court is Plaintiffs' "Renewed Motion to Reopen the case and Reinstate Counts Five

through Seven" (Docket #53). Defendants do not oppose the Motion to Reopen because they believe the case should be reopened for the sole purpose of dismissal of the action. Defendants argue that this Court should dismiss this case pursuant to federal statute, 28 U.S.C. § 1738, and the Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, pursuant to the Montana Supreme Court's decision in *Seven Up Pete Venture v. Montana,* 114 P.3d 1009 (Mont. 2005), *cert. denied*, 126 S. Ct. 1332 (2006), and pursuant to *San Remo Hotel v. City and County of San Francisco*, 125 S. Ct. 2491 (2005).

BACKGROUND:

Plaintiffs filed this federal suit in federal district court on April 11, 2000, and they filed a companion suit in state court a few hours later on that same day. Rather than face a dismissal pursuant to *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 195 (1985) (holding that takings claims are not ripe until a State fails "to provide adequate compensation for the taking"), Plaintiffs asked this Court to abstain pursuant to *Railroad Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496 (1941), to permit Plaintiffs to complete their request for compensation in state court before returning to federal court to press their federal takings claims. On August 30, 2001, in response to Plaintiffs' motion to stay all proceedings and Defendants' motion to dismiss the case, this Court dismissed Count One (violation of substantive due process) with prejudice,

dismissed Counts Five through Nine (permanent and temporary takings claims) without prejudice as being unripe, and stayed the remainder of the case (Count Two – Equal Protection violation, Count Three – Impairment of Contracts, and Count Four – Excess of Police Powers).

On June 8, 2005, the Montana Supreme Court ruled against Plaintiffs on their claims, *see Seven Up Pete Venture v. State of Montana*, 114 P.3d 1009 (Mont. 2005), holding that I-137 did not constitute an unconstitutional regulatory taking because Plaintiffs did not possess a protected property interest as defined by Montana and federal law, because I-137 was based on a significant legitimate public purpose and was reasonably related to achieve that legitimate and public purpose, and because Plaintiffs had not actively pursued the permitting process to an extent that would have obligated the Montana Department of Natural Resources and Conservation to extend Plaintiffs' primary lease terms.

On June 20, 2005, the United States Supreme Court held in *San Remo Hotel v. City and County of San Francisco*, 125 S. Ct. 2491 (2006), that the full faith and credit statute, 28 U.S.C. § 1738, precluded landowners who had been required to litigate unripe takings claims in state court under *Pullman* and *Williamson County* from returning to federal court and relitigating their takings claims. The *San Remo* landowners were therefore not allowed to avoid the preclusive effect of a final judgment of the state court denying compensation. *Id.* at 2500-2507. The

Supreme Court explicitly refused to create an exception to the full faith and credit statute in order to provide a federal forum for litigants seeking to advance federal takings claims: "Federal courts . . . are not free to disregard 28 U.S.C. § 1738 simply to guarantee that all takings plaintiffs can have their day in federal court." *Id.* at 2502.

On February 21, 2006, the U.S. Supreme Court denied certiorari to Plaintiffs in their state court appeal, *see Seven Up Pete Venture v. Montana,* 126 S. Ct. 1332 (2006), thereby finalizing the Montana Supreme Court's decision.

Plaintiffs now wish to reopen this case and reinstate Counts Five through Seven of their Complaint, which are the previously unripe takings claims (both the permanent takings and temporary takings claims) for which they seek monetary damages. Counts Five through Seven were dismissed as unripe on August 30, 2001. Plaintiffs do not, however, request that the case be reopened in order that they might litigate Counts Two through Four, which were stayed pursuant to *Pullman.*

DISCUSSION

Defendants have asserted that Counts Five through Seven must be dismissed pursuant to the Eleventh Amendment, which provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. The U.S. Supreme Court has interpreted the Eleventh Amendment to extend to suits filed by citizens against their own states. *Hans v. Louisiana,* 123 U.S. 1 (1890). Thus, federal courts may not hear cases filed against unconsenting states. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984).

A State's Eleventh Amendment immunity from suit may be waived by Congress in clear, unmistakable language, or it may be waived by a State by express language or by overwhelming implication of text. *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242-43 (1985) (Congress may abrogate immunity); *Edelman v. Jordan,* 415 U.S. 651, 673 (1974) (State may waive immunity). In this case, Defendants, who (the parties now agree) are state government officials sued in their official capacities, have asserted Eleventh Amendment immunity in their first motion to dismiss filed on May 16, 2000 (Docket #10), *see,* Defs.' Reply at 14 n.5 (Docket #24), and reiterated in their subsequent brief on Plaintiffs' motion to reopen and reinstate, *see* Defs.' Response at 7 (Docket #48).

Defendants rely on *Broughton Lumber Co. v. Columbia River Gorge Commission*, 97 F.2d 616 (9th Cir. 1992). In that case, a landowner brought an inverse condemnation action against the States of Oregon and Washington after the landowner was denied permission to subdivide its lot within the Columbia River Gorge National Scenic Area. This

Area was created by the Columbia River Gorge National Scenic Area Act ("Gorge Act"), 16 U.S.C. §§ 544-544p. The landowner sued the Columbia River Gorge Commission, the State of Oregon, and the State of Washington. The district court dismissed the landowner's action against the States of Oregon and Washington for lack of jurisdiction pursuant to their Eleventh Amendment immunity from suit. On appeal, the panel affirmed, finding that no act of Congress (including the Gorge Act) waived the States' immunity, and finding further that neither the Gorge Act (which explicitly provided for state court jurisdiction over actions involving the Commission) nor the Commission itself had waived the Commission's Eleventh Amendment immunity. The panel concluded that the district court had properly dismissed the action against the States and the Commission for lack of subject matter jurisdiction.

In this case, no act of Congress explicitly waives the State of Montana's Eleventh Amendment immunity. Counts Five through Nine all seek retroactive monetary relief payable from the State of Montana's treasury. The State of Montana has not waived immunity from suit for damages in federal court. *Montana v. Gilham,* 133 F.3d 1133, 1139 (9th Cir. 1998). Pursuant to *Broughton Lumber,* this Court must acknowledge Montana's sovereign immunity from suit in federal court by concluding that this Court is without subject matter jurisdiction to adjudicate Counts Five through Nine.

Even if this Court did have subject matter jurisdiction, however, this Court would still be compelled to dismiss Counts Five through Nine pursuant to the holding of the United States Supreme Court in *San Remo Hotel v. City and County of San Francisco*, 125 S. Ct. 2491 (2005). *San Remo* requires this Court to consider carefully the Montana Supreme Court's decision in *Seven Up Pete Venture v. Montana*, 114 P.3d 1009 (Mont. 2005), *cert. denied*, 126 S. Ct. 1332 (2006), and to give full faith and credit to that decision as is required by statute, 28 U.S.C. § 1738, and the United States Constitution's Full Faith and Credit Clause, U.S. Const. Art. IV, § 1. Significantly, the Montana Supreme Court held that because Plaintiffs did not possess a protected property interest under Montana law (which is itself grounded in federal law), there could be no taking of a property right. Plaintiffs had argued that, notwithstanding the fact that they had no right to mine, they had a property right in "'the opportunity for a favorable ruling on [their] mining permit application'". . . . *Seven Up Pete Venture,* 114 P.3d at 314. In disposing of that argument, the Montana Supreme Court held that Plaintiffs' 'opportunity for a favorable ruling' was not a protected property interest for purposes of constitutional takings analysis. *Id.* at 319 ("We conclude, therefore, that the Venture's 'opportunity' to seek a permit, which required convincing the State that this cyanide leaching project was appropriate, did not constitute a property right. The State had wide discretion to reject the Venture's permit application, even without the enactment of I-137.") That mixed

finding of fact and conclusion of law is necessary to the Montana Supreme Court's judgment, and under *San Remo* it must be given preclusive effect:

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

San Remo, 125 S. Ct. at 2500 n.16 (quoting *Allen v. McCurry,* 449 U.S. 90, 94 (citations omitted)). As the Montana Supreme Court correctly noted, without a protected property interest, there can be no taking.

San Remo means in essence that takings litigants who are involuntarily transferred to state courts to ripen their takings claims must bear the risk that the state court will make findings of fact and conclusions of law that will effectively terminate their claims in state court and prohibit a second bite of the apple in federal court. Were it not for the bar of Eleventh Amendment immunity, this is what would have occurred in this case.

CONCLUSION:

Counts Five through Nine were dismissed on August 30, 2001, and it is clear that this Court cannot

reinstate Counts Five through Nine for lack of subject matter jurisdiction over the claims. The Court therefore grants the Motion to Reopen the case but denies the Motion to Reinstate Counts Five through Nine because those Counts should be dismissed with prejudice. This leaves remaining only Counts Two through Four, to which Defendants have previously asserted the defense of qualified immunity. (These claims are also parallel to state claims that were decided against Plaintiffs by state appellate and/or trial courts.) By failing to seek reinstatement of Counts Two through Four, Plaintiffs apparently intend to abandon those counts, which should therefore be dismissed with prejudice. Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Reopen Case is GRANTED.

IT IS FURTHER ORDERED that the stay of the case imposed on August 30, 2001, is LIFTED.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Reinstate Counts Five through Nine is DENIED.

IT IS FURTHER ORDERED that Counts Five through Nine of the Complaint are DISMISSED with prejudice for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that Counts Two through Four are DISMISSED with prejudice.

IT IS FURTHER ORDERED that Plaintiffs' Complaint is DISMISSED and all relief is denied to Plaintiffs. Let judgment enter.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 11th day of April, 2006.

/s/ Charles C. Lovell
CHARLES C. LOVELL
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

HELENA DIVISION DISTRICT OF MONTANA

SEVEN-UP VENTURE, et al.

V.

Brian Schweitzer, Governor of the State of Montana, and Richard Opper, Director of Montana Dept. of Environmental Quality

JUDGMENT IN A CIVIL CASE

Case Number: CV 00-13-H-CCL

(Filed Apr. 11, 2008)

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Plaintiffs' Motion to Reopen the Case having been granted;

That the stay of the case imposed on 8/30/01 having been lifted;

That Plaintiffs' Motion to Reinstate Counts Five through Nine having been denied;

That Counts Five through Nine of the Complaint having been dismissed with prejudice for lack of subject matter jurisdiction;

and that Counts Two through Four having been dismissed with prejudice;

ORDERED that Plaintiffs' Complaint is Dismissed and all relief is denied to Plaintiffs.

April 11, 2006	PATRICK E. DUFFY
Date	Clerk
	/s/ Barbara A. Fries
	(By) Deputy Clerk

126 S.Ct. 1332

Supreme Court of the United States

SEVENUP PETE VENTURE, dba Seven Up Pete Joint Venture, et al., petitioners,

v.

MONTANA, et al.

No. 05-588.

Feb. 21, 2006

Case below, 327 Mont. 306, 114 P.3d 1009.

Petition for writ of certiorari to the Supreme Court of Montana denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

SEVEN-UP VENTURE, an Arizona partnership, d/b/a SEVEN-UP PETE JOINT VENTURE; CANYON RESOURCES CORPORATION, a Delaware Corporation; JEAN MUIR; DR. IRENE HUNTER; DAVID MUIR; ALICE CANFIELD; TONY PALAORO; JUNE E. ROTHE-BARNESON; AMAZON MINING COMPANY, a Montana Partnership; PAUL ANTONIOLI; STEPHEN ANTONIOLI; and JAMES E. HOSKINS,

Plaintiffs,

vs.

BRIAN SCHWEITZER, Governor of the State of Montana, and RICHARD OPPER, Director of the Montana Department of Environmental Quality,

Defendants.

CV 00-13-H-CCL

ORDER

(Filed Jan. 30, 2006)

* * *

Before the Court is Plaintiffs' "Motion to Reopen the case and Reinstate Counts Five through Seven." Defendants oppose the motion on the ground that the Motion to Reopen is premature, the Plaintiffs not having yet completed their appeal in their state court case. Indeed, Plaintiffs filed their Petition for Writ of Certiorari on November 4, 2005, and the United States Supreme Court has neither granted nor denied the Petition.

According to *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), Plaintiffs must seek just compensation in state court before advancing their takings claims in federal court. Until Plaintiffs' appeal to the U.S. Supreme Court is complete (including any necessary proceedings on remand), Plaintiffs' takings claims are unripe.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Reopen Case and Reinstate Counts is DENIED, with leave to refile after the conclusion of the state court litigation.

IT IS FURTHER ORDERED that the parties' Joint Motion to Substitute Parties is GRANTED.

IT IS FURTHER ORDERED that the Applications for Admission Pro Hac Vice of Daniel S. Hoffman and Sean Connelly are GRANTED.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 27th day of January, 2006.

/s/ Charles C. Lovell
CHARLES C. LOVELL
SENIOR UNITED STATES
DISTRICT JUDGE

No. 03-154

IN THE SUPREME COURT
OF THE STATE OF MONTANA

2005 MT 146

SEVEN UP PETE VENTURE, an Arizona General Partnership, d/b/a SEVEN UP PETE JOINT VENTURE; CANYON RESOURCES CORPORATION, a Delaware corporation; JEAN MUIR; DR. IRENE HUNTER; DAVID MUIR; ALICE CANFIELD; TONY PALAORO; JUNE E. ROTH-BARNESON; AMAZON MINING COMPANY, a Montana Partnership; PAUL ANTONIOLI; STEPHEN ANTONIOLI, and JAMES E. HOSKINS,

Plaintiffs and Appellants,

v.

THE STATE OF MONTANA,

Defendant and Respondent,

MONTANA ENVIRONMENTAL INFORMATION CENTER, MONTANANS FOR COMMON SENSE MINING LAWS – FOR I-137, BIG BLACKFOOT CHAPTER OF TROUT UNLIMITED, and MINERAL POLICY CENTER,

Defendants, Intervenors and Respondents.

SEVEN UP PETE VENTURE,

Petitioner and Appellant,

v.

THE STATE OF MONTANA,
acting by and through its
Department of Natural Resources,

Respondent and Respondent.

APPEAL FROM: The District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. BDV 2000-250,
Honorable Jeffrey M. Sherlock, Judge

COUNSEL OF RECORD:

For Appellants:

Alan L. Joscelyn, Gough, Shanahan, Johnson & Waterman, Helena, Montana

Sean Connelly and Daniel S. Hoffman (argued), Hoffman, Reilly, Pozner & Williamson, Denver Colorado

For Respondent:

Honorable Mike McGrath, Attorney General; Brian M. Morris (argued), Solicitor, Helena, Montana

Tommy H. Butler, Special Assistant Attorney General, Helena, Montana (DNRC)

Ed Hayes and John North, Special Assistant Attorneys General, Helena, Montana (DEQ)

Karl Englund, Elizabeth Brennan and Jack R. Tuholske, Attorneys at Law, Missoula, Montana (Intervenors)

Argued and Submitted: October 28, 2003

Decided: June 8, 2005

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 The Seven Up Pete Venture (the Venture) appeals from the December 9, 2002, order entered by the First Judicial District Court, Lewis and Clark County, whereby the District Court granted summary judgment in favor of the State, denied the Venture's request for judicial review, and affirmed the order of the hearing examiner dated October 26, 2000. We affirm.

¶2 We address the following issues on appeal:

¶3 Did the District Court err in concluding that the enactment of I-137 did not constitute a taking of the Venture's property rights?

¶4 Did the District Court err by not addressing the takings claims made by private parties in its order granting summary judgment?

¶5 Did the District Court err in concluding that the passage of I-137 did not substantially impair the Venture's mineral leases pursuant to the Contracts Clause?

¶6 Did the District Court err in concluding that the DNRC properly terminated the Venture's mineral leases prior to resolution of its legal challenge to I-137?

FACTUAL AND PROCEDURAL BACKGROUND

¶7 This case arises out of the November 1998 passage of Initiative 137 (I-137) by the citizens of Montana. I-137 pertains to the use of cyanide leaching[1] for mining purposes, and was subsequently codified as § 82-4-390, MCA, which provides:

> **Cyanide heap and vat leach open-pit gold and silver mining prohibited.**
>
> (1) Open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore-processing reagents is prohibited except as described in subsection (2).

---

[1] According to the United States Environmental Protection Agency, cyanide leaching, also known as cyanidation, includes heap leaching which is a method that was developed to efficiently "beneficiate a variety of low-grade, oxidized gold ores." "Cyanidation uses solutions of sodium or potassium cyanide as lixiviants (leaching agents) to extract precious metals from ore." OFFICE OF SOLID WASTE, U.S. ENVIRONMENTAL PROTECTION AGENCY, NTIS ANNOUNCEMENT ISSUE: 9424, *Treatment of Cyanide Heap Leaches and Tailings* (1994).

> (2) A mine described in this section operating on November 3, 1998, may continue operating under its existing operating permit or any amended permit that is necessary for the continued operation of the mine.

¶8 In 1986, the State of Montana leased six state properties for mining purposes (the Mineral Leases) to Western Energy Company. The Mineral Leases were located near Lincoln, Montana, and covered approximately 3,000 acres. In 1991 the Venture,[2] the principal plaintiff in this action, succeeded to Western Energy's interest in the Mineral Leases. The remaining eight individual plaintiffs (collectively the "individual plaintiffs"), the Amazon Mining Company and Canyon Resources Corporation have surface and mineral interests in the general vicinity of Lincoln which were also affected by I-137. The land encompassed by the Venture's Mineral Leases and private holdings, including the remaining plaintiffs' private holdings, are respectively known as the "McDonald Project," the "Keep Cool Prospect," and the "Seven Up Pete Project." The McDonald Project is the largest of the areas at issue and is where the Venture discovered roughly 9 million ounces of gold, and 20 million ounces of silver, approximately half of which could

---

[2] The Venture is an Arizona general partnership owned between Canyon Resources Corporation, the owner of a 36.125 percent interest, and CR Montana Corporation, the owner of a 63.875 percent interest. CR Montana Corporation is a wholly-owned subsidiary of Canyon Resources Corporation.

profitably be recovered and sold by means of a surface mine combined with cyanide leaching of the ore.

¶9 Each Mineral Lease contained a ten-year primary lease term which was to run continually thereafter, so long as "minerals . . . are being produced in paying quantities from said premises, the royalties and rents . . . are being paid, and all other obligations are fully kept and performed." In addition, paragraph 7 of the Mineral Leases stipulated that, "[t]he lessee shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation. The lessee shall conduct and reclaim the operation in accordance with the performance and reclamation standards of applicable mine reclamation laws." The Mineral Leases also incorporated an Attachment which provided that "no activities shall occur on the tract until an Operating Plan or Amendments have been approved [by the State]."

¶10 In 1992, the Venture commenced discussions with the State, acting through the Department of State Lands (DSL), about the acquisition of an operating permit which was required for mining and mineral processing activities pursuant to the Montana Metal Mine Reclamation Act (MMRA). Additionally, on November 1, 1993, the Venture entered a Memorandum of Agreement (MOA) with the State regarding preparation of an environmental impact

statement (EIS)[3] for the McDonald Project, a large scale undertaking which consequently turned the preparation of the EIS into a colossal task. The MOA recited that, "[t]he proposed Project would utilize . . . heap leaching to extract gold, silver, and other trace metals from ore," and provided guidance for preparation of the EIS.

¶11 Because of the Venture's growing uncertainty as to whether it had sufficient time to complete the operating permit application process and obtain the State's approval within the primary lease term of ten years, which was set to expire in 1996, the Venture entered into a Mineral Lease Amendment Agreement (the Lease Amendment) with the State on August 26, 1994, to extend the primary lease term. The Lease Amendment tolled the running of the seventeen months which then remained on the primary lease term, on the condition that the Venture "actively pursue" an operating permit. The Lease Amendment also provided that "[e]xcept as expressly amended hereby, the Mineral Leases shall remain in full force and effect according to their terms."

¶12 On November 21, 1994, the Venture submitted an application for an operating permit to the DSL[4]

---

[3] The Montana Environmental Policy Act requires environmental impact statements for activities that, among other things, "significantly affect [ ] the quality of the human environment." Section 75-1-201(1)(b)(iv), MCA.

[4] As part of an executive agency reorganization in 1996, the Department of Environmental Quality (DEQ) assumed the

(Continued on following page)

with a proposal to construct and operate the McDonald Project as a surface mine combined with cyanide leaching for gold and silver. The State had sixty days to render a decision pursuant to § 82-4-337, MCA. However, the sixty-day deadline was extended by the parties by various agreements, which ultimately extended the decisional deadline to January 31, 2000. As the environmental review process progressed, the parties also executed a series of contract modifications pertaining to the McDonald Project EIS. However, none of the modifications released the Venture from its obligations set forth in the Mineral Leases.

¶13 On July 2, 1998, the Department of Environmental Quality (DEQ) issued a stop-work order on the McDonald Project EIS because of the Venture's failure to pay fees relating to third-party EIS services. The Venture fell further into arrears by failing to make monthly invoice payments to the DEQ from July 1998 to December 1998. As a result, the Department of Natural Resources and Conservation (DNRC) notified the Venture by letter in September 1998 that, because of the issuance of the DEQ stop-work order on the EIS, the time extension granted to the Venture for purposes of obtaining the operating permit was suspended, and the remaining unexpired primary term of seventeen months would begin to run

---

DSL's responsibilities under MMRA. Thus, the Venture's subsequent exchanges with the State regarding acquisition of the operating permit were with the DEQ.

for each of the Mineral Leases. The DNRC also informed the Venture that the Mineral Leases would terminate on their own accord on February 23, 2000, unless the Venture reactivated the permitting process, which would re-toll the running of any remaining unexpired primary terms in the Mineral Leases.

¶14 Meanwhile, in November 1998, Montana became the first state to prohibit open-pit mining for gold and silver using cyanide heap leaching by the passage of I-137, subsequently codified as § 82-4-390, MCA. I-137 took effect immediately, but expressly exempted mines operating under an existing permit as of November 3, 1998. Although its Mineral Leases were in effect, the Venture did not have an existing operating permit and was therefore not exempted from the facial application of I-137.

¶15 On December 31, 1998, the Venture paid all past-due EIS invoices from the DEQ. However, on February 24, 2000, the DNRC notified the Venture by letter that the permitting process had not been reactivated because of "the [Venture's] failure to diligently pursue acquisition of a permit under Montana's Metal Mine Reclamation Act," and that such cessation of the permitting process constituted a material breach of the August 26, 1994, Lease Amendment. The DNRC explained that the permitting process was not reactivated because the Venture failed to provide a revised MOA that included an acceptable standing account balance, failed to submit a revised proposal for its operating and reclamation plan to comport with § 82-4-390, MCA, failed to produce minerals in paying

quantities, and failed to remit any mineral royalties to the State. Consequently, the DNRC advised the Venture that its six Mineral Leases terminated on their own accord on February 23, 2000. The Venture's subsequent administrative appeal regarding the DNRC's lease termination was rejected by the DNRC's Director.

¶16 On April 11, 2000, the Venture, individual plaintiffs, the Amazon Mining Company, and the Canyon Resources Corporation (collectively "the Plaintiffs") filed a complaint in the First Judicial District Court, Lewis and Clark County, alleging twelve separate counts, and later added two counts in an amended complaint.[5] On the same day, the Plaintiffs also filed a complaint in the United States District Court for the District of Montana. The United States District Court subsequently dismissed the Plaintiffs' takings claims on ripeness grounds, but without prejudice, and stayed the proceedings on

---

[5] The 14 counts included: (1) I-137 is unenforceable for failure to meet statutory requirements; (2) substantive due process; (3) equal protection; (4) impairment of obligation of contracts; (5) in excess of limits on states police powers; (6) permanent taking – the Venture; (7) permanent taking – Canyon Resources Corporation; (8) permanent taking – individual plaintiffs, Amazon Mining Company, and the Venture; (9) temporary taking – McDonald Project and the Venture; (10) temporary taking – McDonald Project and Canyon Resources Corporation; (11) breach of contract; (12) breach of implied covenant of good faith and fair dealing; (13) petition for judicial review; and (14) declaratory judgment-specific performance of the leases.

their federal claims because proceedings were pending in the state district court.

¶17 On November 1, 2001, the District Court issued an order granting the State's motion for summary judgment on counts two (substantive due process) and three (equal protection), and granting the State's motion to dismiss counts one (statutory requirements) and five (police powers). The District Court granted the State's motion for summary judgment on the remaining counts in a separate order on December 9, 2002, which included the Venture's request for judicial review of the DNRC's administrative decision upholding the termination of its Mineral Leases. The Plaintiffs appeal only that portion of the District Court's December 9, 2002, order denying its takings, contract impairment, and lease termination claims.

STANDARD OF REVIEW

¶18 When resolution of an issue involves a question of constitutional law, this Court's review of the district court's interpretation of the law is plenary. *State v. Price,* 2002 MT 229, ¶ 27, 311 Mont. 439, ¶ 27, 57 P.3d 42, ¶ 27.

¶19 This Court's review of a district court's grant or denial of a motion for summary judgment is *de novo. Watkins Trust v. Lacosta,* 2004 MT 144, ¶ 16, 321 Mont. 432, ¶ 16, 92 P.3d 620, ¶ 16. Thus, we apply the same Rule 56, M.R.Civ.P., criteria as applied by the district court. *Peyatt v. Moore,* 2004 MT 341, ¶ 13, 324

Mont. 249, ¶ 13, 102 P.3d 535, ¶ 13. Summary judgment is proper only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Lacosta,* ¶ 16 (citing Rule 56(c), M.R.Civ.P.).

DISCUSSION

¶20 **Did the District Court err in concluding that the enactment of I-137 did not constitute a taking of the Venture's property rights?**

¶21 The Venture argues that I-137 effectuated a regulatory taking of its property rights without compensation because, "while property may be regulated to a certain extent, if [the] regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322, 326. The Venture asserts that because I-137 precludes the only economically viable use of mineral extraction for its project, specifically the use of cyanide leaching, there has been a categorical regulatory taking pursuant to the holding in *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798. In *Lucas,* the United States Supreme Court established the principle that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas,* 505 U.S. at 1019, 112 S.Ct. at 2895, 120 L.Ed.2d at 815.

¶22 The Venture emphasizes that it is not contending it had a vested right to mine with cyanide, but that it had a property right in "the opportunity for a favorable ruling on its mining permit application" which existed prior to the passage of I-137. The Venture offers that this "opportunity" is a constitutionally protected property right that became obsolete after the passage of I-137. The Venture explains that contract rights and leases are forms of property, and as such, when taken for a public purpose, require payment of just compensation. The Venture notes that the United States Supreme Court in *Mobil Oil Exploration & Producing Southeast, Inc. v. United States* (2000), 530 U.S. 604, 120 S.Ct. 2423, 147 L.Ed.2d 528, held that leases can provide valuable rights that may "amount[ ] primarily to an *opportunity* to try to obtain . . . development rights." *Mobil Oil*, 530 U.S. at 620, 120 S.Ct. at 2436, 147 L.Ed.2d at 542. Therefore, the Venture claims it is entitled to just compensation to be measured by the value of the Mineral Leases before the passage of I-137, taking into account the possibility that a permit might have been denied.

¶23 The State responds by arguing that I-137 did not cause a taking of any property interest held by the Venture because the Mineral Leases and Lease Amendment did not guarantee that the Venture would be permitted to mine gold or silver using the cyanidation process. The State explains that the Mineral Leases contain clauses that directly condition the Venture's mining rights on the acquisition of

an operating permit, which the Venture failed to acquire. The State notes that paragraph 7 in the Mineral Leases also conditioned the Venture's development of the mineral estate upon the Venture's compliance with all applicable state and federal laws, rules, and regulations. Consequently, the State claims that because the Venture lacked the requisite operating permit to mine using cyanide, it did not have an established property right. Citing to *Reeves v. United States* (2002), 54 Fed. Cl. 652,[6] the State also offers that "[e]ven with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties." *Reeves,* 54 Fed. Cl. at 672 (citing *United States v. Locke* (1985), 471 U.S. 84, 104, 105 S.Ct. 1785, 1797, 85 L.Ed.2d 64, 82).

¶24 The State notes that the I-137 prohibitions did not apply to existing operating permits allowing use of cyanide leaching as of November 3, 1998; it was only because the Venture did not have an existing permit as of that date, that it did not come within the exemption. Further, the State argues that I-137 does

---

[6] In *Reeves,* the Court of Federal Claims rejected a mining company's Fifth Amendment takings claim that the President's designation of land as a national monument on which it held validly staked, unpatented mining claims, worked a regulatory taking of its property interest. *Reeves,* 54 Fed. Cl. at 673-74.

not prohibit all mining techniques and thereby eliminate all economically beneficial uses of the land, but rather only prohibits the use of the cyanide leaching method to process ore extracted from an open-pit. We note, however, that the State conceded in the District Court, for purposes of summary judgment, that all parties understood that their agreement contemplated that the Venture's permit application was premised on use of the cyanide heap leaching as the method of extraction.

¶ 25 Article II, Section 17, of the Montana Constitution affords protection of property by providing that "[n]o person shall be deprived of life, liberty, or property without due process of law." The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

¶ 26 The guarantees of the Fifth and Fourteenth Amendments "'apply only when a constitutionally protected . . . property interest is at stake.'" *Kiely Constr. L.L.C. v. City of Red Lodge,* 2002 MT 241, ¶ 23, 312 Mont. 52, ¶ 23, 57 P.3d 836, ¶ 23 (citing *Tellis v. Godinez* (9th Cir.1993), 5 F.3d 1314, 1316). *Cf. State ex rel. Riley v. District Court* (1937), 103 Mont. 576, 586, 64 P.2d 115, 120 ("A public office is that of a public trust or agency created for the benefit of the people . . in which the incumbent has not a property right; not being property, a deprivation of . . . his office is not the taking of property. . . .").

Additionally, "even if government action might otherwise constitute a taking of property, it will not if it is shown that what the government prohibits does not amount to a private property right in the first place. Said another way, an owner cannot maintain an action for loss of a property right that it . . . [never had]." *Kinross Copper Corp. v. State of Oregon* (1999), 160 Or.App. 513, 981 P.2d 833, 836-37. *See also Kiely,* ¶23. Property interests, while not created by the Constitution, are created and "defined by existing rules or understandings that stem from an independent source, such as state law." *Kiely,* ¶ 24 (citing *Board of Regents v. Roth* (1972), 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561). Under Montana law, "[t]he threshold question of whether one has a protected property interest must . . . be answered in the affirmative before the question of whether one was deprived of that interest may be submitted to" the trier of fact. *Kiely,* ¶ 25.

¶27 The Legislature mandated, pursuant to the MMRA, that an operating permit be obtained before mining may be pursued:

> A person may not engage in mining, ore processing . . . construct or operate a hard-rock mill, use cyanide ore-processing reagents or other metal leaching solvents or reagents, or disturb land in anticipation of those activities in the state without first

> obtaining an operating permit from the department.[7]

Section 82-4-335(1), MCA. Likewise, this Court has held, pursuant to § 82-4-335(1), MCA, that a lessee of state lands has no right to engage in mining operations until an operating permit has been obtained. *Kadillak v. Anaconda Co.* (1979), 184 Mont. 127, 138-40, 602 P.2d 147, 154-55.

¶28 Clearly, the right to mine is conditioned upon the acquisition of an operating permit. In determining whether there is a property right in the "opportunity" to obtain a permit, we find further guidance in our decision in *Kiely*. There, we cited to *Gardner v. Baltimore Mayor and City Council* (4th Cir.1992), 969 F.2d 63, 68, for the proposition that "a property-holder possesses a legitimate claim of entitlement to a permit or approval . . . [if] under state and municipal law, the local agency lacks all discretion to deny issuance of the permit or to withhold its approval. . . . [U]nder this standard, a cognizable property interest exists '*only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured.*'" *Kiely*, ¶ 28 (citing *Gardner*, 969 F.2d at 68). Thus, we look to the decision-maker's degree of discretion and not to the probability of the decision's favorable outcome. *Kiely*, ¶ 29.

---

[7] The "department" refers to the DEQ.

¶29 In analyzing whether the State had discretion in the issuance of an operating permit to the Venture, we begin by looking to the DEQ administrative regulations governing the issuance of operating permits. Rule 17.24.122, ARM (2004), provides that, "[t]he department may approve the assignment of a permit if the requirements of . . . this rule are met."[8] Also, Rule 17.24.404, ARM (2004),[9] provides that:

> (1) The [DEQ] shall review each administratively complete application . . . and determine the acceptability of the application. . . .[10]
>
> (2)(a) If the application is not acceptable, the [DEQ] shall notify the applicant in writing, setting forth the reasons why it is not acceptable. The [DEQ] may propose modifications, delete areas, or reject the entire application.[11]

---

[8] Rule 17.24.122, ARM, was originally enacted in 1994 as Rule 26.4.107F under the purview of the DSL. 21 Mont. Admin. Reg. 2952 (November 10, 1994). Due to an administrative reorganization in 1996, it was re-numbered as 17.24.122, and delegated under the authority of the DEQ.

[9] Rule 17.24.404, ARM, was originally enacted in 1980 as Rule 26.4.404 under the purview of the DSL. 5 Mont. Admin. Reg. 725 (March 13, 1980). Due to an administrative reorganization in 1996, it was re-numbered as 17.24.404, and delegated under the authority of the DEQ.

[10] This provision was enacted in 1980. 5 Mont. Admin. Reg 725 (March 13, 1980). It was amended in 1988. 13 Mont. Admin. Reg. 1365 (July 14, 1988).

[11] This provision was added in 1988. 13 Mont. Admin. Reg. 1365 (July 14, 1988). In 1998, the numbering was adjusted, but

(Continued on following page)

. . . .

(4) The [DEQ] shall determine the adequacy of the fish and wildlife plan. . . .[12]

. . . .

(5) The [DEQ] shall assure that:

. . . .

(c) coordination of the review process for cultural resource compliance is carried out in accordance with the provisions of the Archeological Resources Protection Act . . . and

(d) the permit review process is coordinated with applicable requirements of the Endangered Species Act of 1973 . . . the Fish and Wildlife Coordination Act . . . the Migratory Bird Treaty Act . . . the National Historic Preservation Act . . . and the Bald Eagle Protection Act.[13]

(6) If the [DEQ] decides to approve the application it shall require that the applicant file the performance bond or provide other

---

the text remained unchanged. 22 Mont. Admin. Reg. 3008 (November 19, 1998). In 1999, the numbering was adjusted, but the text remained unchanged. 16 Mont. Admin. Reg. 1783 (August 26, 1999).

[12] This provision was enacted in 1980, and was not subsequently amended since that time. 5 Mont. Admin. Reg. 725 (March 13, 1980).

[13] Subsections (c) and (d) were added in 1989, and have not been subsequently amended. 17 Mont. Admin. Reg. 1328 (September 14, 1989).

> equivalent guarantee before the permit is issued.[14]
>
> . . . .
>
> (10) The [DEQ] may not approve an application if the mining and reclamation would be inconsistent with other such operations or proposed or anticipated operations in areas adjacent to the proposed permit area.[15]

¶30 The Mineral Leases contain the following discretionary language:

> The Department shall not approve the Plan until the Lessee has met reasonable requirements to prevent soil erosion, air and water pollution, and to prevent unacceptable impacts to vegetation, wildlife, wildlife habitat, fisheries, visual qualities and other resources and to reclaim any land disturbed by the activities. No work will be conducted without written approval of the Operating Plan.

---

[14] This provision was enacted in 1980. 5 Mont. Admin. Reg. 725 (March 13, 1980). In 1988, the numbering was adjusted, but the text remained unchanged. 13 Mont. Admin. Reg. 1366 (July 14, 1988).

[15] This provision became effective on April 1, 1980. 5 Mont. Admin. Reg. 725 (March 13, 1980). In 1988, the numbering was adjusted, but the text remained unchanged. 13 Mont. Admin. Reg. 1366 (July 14, 1988). In 1994, the numbering was adjusted, but the text remained unchanged. 17 Mont. Admin. Reg. 2502 (September 8, 1994). This provision was repealed on October 22, 2004.

> Surface activity may be denied on all or portions of any tract, if the Commissioner determines, in writing, after an opportunity for an informal hearing with the lessee that the proposed surface activity will be detrimental to Trust resources. . . .

¶31 Additionally, the Mineral Leases and Lease Amendment make clear that the Venture was obligated by contract to secure an operating permit subject to all environmental regulations and conditioned upon the completion of certain regulatory requirements as prescribed by the State, before it would acquire any "right" to mine gold and silver using cyanidation or any other process of mineral extraction. The following relevant clauses illustrate the conditional language found in both the Mineral Leases and Lease Amendment.

> **Paragraph 2 (Mineral Leases: Attachment "A")** – The Department shall not approve the Plan until [the Venture] has met reasonable requirements. . . . No work will be conducted without written approval of the Operating Plan.
>
> **Paragraph 7 (Mineral Leases)** – The [Venture] shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation.
>
> **Number 4 (Lease Amendment)** – [P]rovided that the [Venture] has first procured the applicable Permits under the Metal Mine Reclamation Act, any parcel of the Leased

> Premises may be used by the [Venture] for any Mining purpose. . . .
>
> **Paragraph 9 (Lease Amendment: Appendix A-Definitions)** – "Permits" means all federal, state and local licenses, permits, consents, authorizations, orders or clearances required for Development or Production.

¶32 The discretionary language set forth in the DEQ administrative regulations, Mineral Leases, and Lease Amendment, in addition to the absence of any language limiting the exercise of DEQ's discretion, demonstrates that the DEQ had substantial discretion regarding issuance of an operating permit pursuant to § 82-4-335, MCA. Without question, the DEQ's discretion was not "so narrowly circumscribed that approval . . . [was] virtually assured." *Kiely,* ¶ 28. We conclude, therefore, that the Venture's "opportunity" to seek a permit, which required convincing the State that this cyanide leaching project was appropriate, did not constitute a property right. The State had wide discretion to reject the Venture's permit application, even without the enactment of I-137.

¶33 Furthermore, the Venture had not secured an operating permit as required by the Mineral Leases, Lease Amendment, and § 82-4-335(1), MCA. Thus, the passage of I-137 did not take away any existing permits or halt any on-going mine operations related to the Venture's projects. Because the Venture had not obtained the requisite operating permit, it likewise had not obtained a right to mine. Moreover, it was not assured of ever obtaining such a right. Therefore, we

conclude that the enactment of I-137 did not constitute an unconstitutional taking. Because the analysis in *Lucas* applies only if there is an established property right, we conclude it is not applicable here.

¶34 The Venture relies on *State ex rel. R.T.G., Inc. v. State* (Ohio 2002), 780 N.E.2d 998, to support its contention that I-137 constitutes an unconstitutional restriction upon its mining proposal which renders its investment valueless. In *R.T.G.*, the State of Ohio issued a mining permit to plaintiffs and thereafter designated the land unfit for mining, following the plaintiffs' investment of over $100,000 in the land pursuant to the issuance of the permit. However, that is a very different situation. Had the Venture, like the *R.T.G.* plaintiffs, obtained an operating permit prior to the regulatory change, it could have continued to use cyanide leaching because mines operating with existing permits were exempted from I-137's application. Thus, we conclude that *R.T.G.* is not inconsistent with our holding here.

¶35 **Did the District Court err by not addressing the takings claims made by private parties in its order granting summary judgment?**

¶36 The Plaintiffs assert that the District Court failed to consider the takings claims made in counts six through ten of their amended complaint which were based on private mineral leases or fee ownership of minerals held by the individual plaintiffs, including the ownership interests of plaintiff Canyon Resource Corporation. The Plaintiffs argue that the

District Court considered *only* the takings claims based specifically on the Venture's Mineral Leases with the State, but nevertheless dismissed all remaining claims, including those unrelated to the Mineral Leases, without specifying a rationale. Plaintiffs contend that, in so doing, the District Court violated Rule 52(a), M.R.Civ.P., which provides that "any order . . . granting a motion under Rules 12 or 56 . . . shall specify the grounds therefor with sufficient particularity."

¶37 The Plaintiffs, in counts six through eight, claimed that I-137 constituted a permanent taking of their property. Similarly, in counts nine and ten, the Plaintiffs alleged that I-137 constituted a temporary taking of their property. Thus, the District Court's analysis for counts six through ten hinged on the overall question of whether I-137 constituted a taking of the Plaintiffs' properties. After the District Court conducted a thorough takings analysis, it concluded that I-137 did not constitute a taking "of any property right that *Plaintiffs* owned in the mineral leases," and held that the State was entitled to summary judgment on "Counts Six, Seven, Eight, Nine, and Ten." (Emphasis added.) While the District Court did not specifically reference each individual plaintiff, its conclusion that I-137 did not constitute a taking resolves the issues raised in counts six through ten in Plaintiffs' amended complaint. Therefore, we conclude that the District Court sufficiently addressed the takings claims involving those plaintiffs who similarly

claimed that I-137 constituted a taking, but who had no interests in the Mineral Leases.

¶38 **Did the District Court err in concluding that the passage of I-137 did not substantially impair the Venture's mineral leases pursuant to the Contracts Clause?**

¶39 The District Court concluded that the Venture was "on notice" that new regulations may pass in the future since the mining industry is heavily regulated in Montana, and because the Venture was a "most sophisticated party, and could have negotiated some sort of protection for itself." The District Court concluded that the Venture agreed to be bound by all future environmental regulations pursuant to paragraph 7 of the Mineral Leases (hereinafter "paragraph 7"), which provided that:

> The [Venture] shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation.

Additionally, the District Court reasoned that none of the written documents between the parties obligated the State to allow cyanide heap leaching in an open-pit on the land subject to the Mineral Leases, and therefore determined "the impairment was not of the parties' contract, but was of the Venture's desires." Thus, the District Court disposed of the Venture's Contracts Clause claims by finding no substantial impairment of the contractual relationship since

there was no contractual obligation on the part of the State to allow open-pit mining using the cyanide heap leaching process.

¶40 The Montana Constitution provides that "[n]o ex post facto law nor any law impairing the obligation of contracts . . . shall be passed by the legislature." Art. II, Sec. 31, Mont. Const. Similarly, the United States Constitution states that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts." U.S. Const., Art. I, § 10. This Court has not given an absolute interpretation of the Contracts Clause, but has instead concluded that "private contracts must give way before a legitimate exercise of [the state's] police power," and that business conducted in Montana is "subject to the retained power of the state to protect public welfare." *Western Energy Co. v. Genie Land Co.* (1987), 227 Mont. 74, 82, 737 P.2d 478, 483. Likewise, "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." *City of Billings v. County Water Dist.* (1997), 281 Mont. 219, 229, 935 P.2d 246, 252. However, we have also acknowledged that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate [when] the State's self-interest is at stake." *City of Billings,* 281 Mont. at 229, 935 P.2d at 252.

¶41 These Contracts Clause principles are applied by way of a three-part test this Court employs when analyzing a Contracts Clause challenge:

(1) Is the state law a substantial impairment to the contractual relationship;

(2) Does the state have a significant and legitimate purpose for the law; and,

(3) Does the law impose reasonable conditions which are reasonably related to achieving the legitimate and public purpose?

Carmichael v. Workers' Comp. Court (1988), 234 Mont. 410, 414, 763 P.2d 1122, 1125. Under the first prong of the test, we must first determine whether there is a contractual relationship, and if so, whether the law substantially impaired the contractual relationship. *General Motors Corp. v. Romein* (1992), 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328, 337.[16] In determining impairment, we will consider the extent to which the industry has been regulated in the past. *Buckman v. Montana Deaconess Hosp.* (1986), 224 Mont. 318, 326-27, 730 P.2d 380, 385. It should be noted that if we conclude there is no substantial impairment to the contractual relationship,

---

[16] In *Romein*, the United States Supreme Court relied upon the Contracts Clause analysis it had employed in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983), 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569, to determine whether a state law operated as a substantial impairment to a contractual relationship. This Court has previously relied upon *Energy Reserves* for guidance regarding our Contracts Clause analysis. *See Carmichael*, 234 Mont. at 414, 763 P.2d at 1125; *Western Energy*, 227 Mont. at 83, 737 P.2d at 484; *Buckman v. Montana Deaconess Hosp.* (1986), 224 Mont. 318, 326, 730 P.2d 380, 385.

the inquiry ends. *Neel v. First Fed. Sav. & Loan Ass'n* (1984), 207 Mont. 376, 391, 675 P.2d 96, 104.

¶42 It is undisputed that a contractual relationship existed between the State and the Venture. Regarding whether the law substantially impaired the contractual relationship, the Venture argues that I-137 not only impaired, but "destroyed" its Mineral Leases. The Venture takes exception to the District Court's reliance on paragraph 7, arguing that paragraph 7 merely acknowledged the State's right to "regulate," and did not authorize the State to destroy its contract entirely via subsequent legislation. The Venture explains that its contractual relationship with the State, "as a whole," including all subsequent agreements made after the Mineral Leases, indicates that the parties contemplated that the Venture would mine using the cyanide heap leaching process. As a result, the Venture contends that these agreements demonstrate that it never agreed to be bound to future laws which would completely ban the use of cyanide heap leaching process, and that I-137 therefore substantially impaired its contractual agreements. The Venture accounts its interests – for which it invested more than $70 million and expected to reap millions in return – as now worthless.

¶43 The State responds by arguing, as the District Court concluded, that I-137 did not substantially impair the contractual relationship because paragraph 7 provides that the Venture shall fully comply with "all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety,

environmental protection and reclamation." The State explains that one of the purposes behind I-137 is to protect the environment, and that the Venture, through paragraph 7, expressly agreed to comply with environmental regulations. The State also urges this Court to follow *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001), 86 Cal.App.4th 534, 103 Cal.Rptr.2d 447, which held that "[a] total prohibition of previously authorized conduct, as would occur with application of [the law causing the alleged impairment] to the [contract at issue], is not necessarily unconstitutional . . . [and that] a statute does not violate the Contract[s] Clause simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment. . . ." *Stop Oil,* 86 Cal.App.4th at 554, 103 Cal.Rptr.2d at 461. In *Stop Oil,* the voters adopted a law in 1984 which allowed for exceptions to a complete ban on all oil exploration and production which had been in effect since 1932. The Macpherson Oil Company (Macpherson) entered into a lease agreement with the city in 1992 whereby Macpherson obtained the right to conduct oil and gas operations within the city, but also agreed to "comply with all laws, rules and regulations of the United States, of the State of California . . . and of the [city] applicable to the Lessee's operations. . . ." *Stop Oil,* 86 Cal.App.4th at 556, 103 Cal.Rptr.2d at 463. The primary issue in *Stop Oil* was whether the November 1995 passage of Proposition E, a voter initiative reestablishing a complete ban on oil exploration and production,

unconstitutionally impaired Macpherson's 1992 lease agreement with the city. The *Stop Oil* court concluded that Proposition E did not constitute a substantial impairment in violation of the Contracts Clause because Macpherson lacked a vested right to continue with the project absent the necessary permits. The State urges this Court to rely on the *Stop Oil* court's reasoning and similarly conclude that there was no substantial impairment of contract because the Venture, like Macpherson, had not proceeded far enough with the proposed project to acquire a vested right and did not protect itself from subsequent regulatory changes through a development agreement. *Stop Oil,* 86 Cal.App.4th at 558, 103 Cal.Rptr.2d at 464.

¶44 Although the State points to paragraph 7 of the agreement, under which the Venture agreed to "fully comply with all applicable state and federal laws, rules and regulations," and argues that the contract was not substantially impaired because the Venture had agreed to comply with applicable regulations, we cannot conclude that this contract provision can reasonably be construed to contemplate a first in the nation, statewide ban of the one mining method admittedly contemplated by the parties. Indeed, to "fully comply" with I-137 under these circumstances would leave little purpose for the agreement itself. Although the *Stop Oil* court reasoned that the subject company was sophisticated and should have contractually protected itself from the possibility of the ban, the contract there had been negotiated in a regulatory

environment wherein development had been *banned* for fifty-two years prior to the change in the law which permitted it. In contrast, mining based upon cyanide heap leaching has always been legal in Montana, and, in fact, the country at large. In the context of Montana's long association with mining, we cannot conclude that a party, even one considered sophisticated, could have reasonably anticipated, at the time the agreement was entered in 1986, that Montana would enact the first state ban of this form of mining twelve years later.

¶45 As noted, the State did not contest, for purposes of summary judgment, the Venture's assertion that all parties understood that their agreement contemplated that the Venture's permit application would be based upon an open-pit mine utilizing cyanide heap leaching processing of the ore. Thus, though the Venture lacked a property or contract right to use the cyanide heap leaching method, absent the requisite operating permit, the Venture's contractual relationship with the State was nonetheless based on the assumption, held by all parties, that the cyanide heap method would be used. Given that assumption, we must conclude that a regulation that banned the future use of the very method of mining upon which the contract itself was based, substantially impaired that contract. Thus, we conclude that the enactment of I-137 constituted a substantial impairment of the Venture's contractual relationship with the State because it acted as a complete barrier to all future

mining development using the cyanide heap leaching method.

¶46 The second prong of the Contracts Clause test requires this Court to determine whether the state law passed by the legislature is based on a significant and legitimate public purpose. *City of Billings,* 281 Mont. at 227-28, 935 P.2d at 251. In this regard, the Montana Constitution provides that "the right to a clean and healthful environment" is an inalienable right of every person. Art. II, Sec. 3, Mont. Const. It further requires that a clean and healthful environment shall be preserved for future generations. Art. IX, Sec. 1(1), Mont. Const. This Court has previously held that environmental regulations represent a reasonable exercise of the police power. *Western Energy,* 195 Mont. at 211, 635 P.2d at 1302. In addition, the United States Supreme Court has held that a state has a "legitimate interest in guarding against . . . environmental risks, despite the possibility that they may ultimately prove to be negligible." *Maine v. Taylor* (1986), 477 U.S. 131, 148, 106 S.Ct. 2440, 2452, 91 L.Ed.2d 110, 127. Consequently, we conclude that I-137 is based on the significant and legitimate public purpose of protecting the environment, thus satisfying the second prong of the test.

¶47 With respect to the third prong, we must determine whether the "application of [I-137] to the facts at issue here is reasonably related to achieving the legitimate and public purpose[ ] of [I-137]." *City of Billings,* 281 Mont. at 229, 935 P.2d at 252. As mentioned herein, we will not give "complete

deference to a legislative assessment" and will apply a "heightened level of scrutiny" when the State is party to the contract or if its self-interest is at stake. *Buckman,* 224 Mont. at 327, 730 P.2d at 385 (citing *U.S. Trust Co. of New York v. New Jersey* (1977), 431 U.S. 1, 25-26, 97 S.Ct. 1505, 1519, 52 L.Ed.2d 92, 111-12).[17] However, the record reveals that the application of I-137 – created and passed by the voters of Montana – did not act to benefit the State's self-interest. The passage of I-137 caused the State to forego the opportunity to receive royalty payments estimated at $5 million annually over the production life of mining operation, which was expected to be twelve years. Thus, though the State was a party to the contract, its interests as a contracting entity were actually diminished by I-137's passage, and thus, for purposes of a Contracts Clause analysis, it is not necessary to apply a heightened level of scrutiny to the Initiative. However, I-137 must nonetheless withstand the reasonableness inquiry under third prong of the test.

¶48 The Plaintiffs introduced several studies in the District Court record regarding the safety of cyanide heap leaching method. Although cyanide heap leaching has been shown to be safer than other methods,

---

[17] "In almost every case, the [United States Supreme Court] has held a governmental unit to its contractual obligations when it enters financial or other markets." *Energy Reserves,* 459 U.S. at 412-13, n.14, 103 S.Ct. at 705, 74 L.Ed.2d at 581-82. *See U.S. Trust Co. of New York v. New Jersey* (1997), 431 U.S. 1, 25-28, 97 S.Ct. at 1519-21, 53 L.Ed.2d 92, 111-14.

one study by a mineral processing and chemical engineering consultant indicated that "there is no question that sodium cyanide is very toxic to humans and other vertebrates."[18] Additionally, another study in the record, prepared by a metallurgical engineer, noted that "cyanide is a highly toxic chemical, either in solution or in its gaseous form."[19]

¶49 Environmental concerns about the use of the cyanide heap leaching method of mining, and the perceived insufficiency of the current laws to protect the environment while employing this method of mining were stated purposes of the Initiative's proponents. In the voter information pamphlet prepared for the election, the proponents stated:

> It's very simple: I-137 is about whether to allow future open-pit cyanide leach mining. The opponents argue that existing laws are strong and will protect Montanans. That is obviously not true. Just read the headlines.

MONTANA VOTER INFORMATION PAMPHLET, General Election, November 3, 1998, at 30.

---

[18] Terry McNulty, *Economic and Technical Analysis of Alternative Technologies for Mining and Processing of Gold/Silver Ores of the McDonald and Seven-up Pete Deposits*, August 15, 2000, at 28.

[19] Doug Halbe, *Review and Summary of Alternative Solvents for Dissolution of Gold and Silver from Ores: Chemistry, Application and Commercialization*, May 17, 2000, at 11.

¶50 In consideration of the acknowledged risks associated with the use of cyanide heap leaching, and the expressed concerns about the inadequacy of existing laws, we conclude that the State could legitimately determine that this method of mining required strict regulation, and that I-137 was reasonably related to that legitimate purpose. "It is clear that the adoption of the regulations by the state for the protection of the environment is a reasonable exercise of its police power." *Western Energy,* 195 Mont. at 211, 635 P.2d at 1302. Therefore, the third prong of the test establishes that the enactment of I-137 does not violate the Contracts Clause of the Montana Constitution.

¶51 The Venture also makes several arguments about the interpretation of paragraph 7, asserting the District Court based its order on an erroneous interpretation thereof. However, the aforementioned conclusions in regard to the effect of paragraph 7 resolve those arguments, and we will not address them individually.

¶52 Finally, the Venture asserts that *Mobil Oil* requires a different outcome because it held that government leases must be construed in a manner rendering them non-illusory, and that such leases should likewise be interpreted to avoid a result whereby a private party invests millions to "buy next to nothing" from the government. *Mobil Oil,* 530 U.S. at 616, 120 S.Ct. at 2433, 147 L.Ed.2d at 539. The Venture explains that, similar to the two oil companies in *Mobil Oil,* it did not agree to be bound by a

subsequently passed law that would: (1) make its mineral leases illusory; (2) require it to waive fundamental constitutional protections; and (3) completely preclude the opportunity to try and obtain a favorable permit decision. The Venture argues that the District Court misapplied *Mobil Oil,* and erroneously construed its lease, thereby resulting in the Venture investing $70 million to buy "next to nothing" – an outcome, it argues, is inconsistent with the holding in *Mobil Oil.*

¶53 In *Mobil Oil,* the United States entered lease agreements with rights to develop and explore for oil off the North Carolina coast with two oil companies in return for up-front "bonus" payments totaling approximately $158 million, plus annual rental payments. The contracts contained conditions requiring the two oil companies to obtain exploration and development permits in accordance with regulations promulgated pursuant to *existing* statutes. The contract did not contemplate future regulations promulgated pursuant to *future* statutes. After the contracts were signed and $158 million in "bonus" payments were made, the United States Congress passed a new statute which was applied to the *Mobil Oil* leases. However, the requirements of the new statute made it impossible for the oil companies to obtain their final approvals to explore for and develop oil. The oil companies subsequently filed a breach of contract claim against the United States and sought

restitution to recover the $158 million in up-front "bonus" payments.[20] The United States Supreme Court concluded that the United States had breached its contract with the oil companies and ordered it to pay $158 million in restitution because it had broken its promise "to follow the terms of pre-existing statutes and regulations" and instead followed a newly-passed statute not in effect at the time of contracting. *Mobil Oil,* 530 U.S. at 624, 120 S.Ct. at 2438, 147 L.Ed.2d at 544. The United States Supreme Court explained that the *Mobil Oil* lease contracts specified that they were "subject to then-existing regulations and to certain future regulations[21]. . . . This explicit reference to future regulations makes it clear that the catchall provision that references 'all other applicable . . . regulations' must include *only* statutes and regulations already existing at the time of the contract." *Mobil Oil,* 530 U.S. at 616, 120 S.Ct. at 2433, 147 L.Ed.2d at 539 (emphasis added). Hence, the *Mobil Oil* leases were not subject to statutes or regulations passed subsequent to the formation of the contract. In addition, the up-front bonus payment of $158 million

---

[20] The oil companies did not seek other damages such as a refund of its annual rental payments of $250,000, or other "soft costs" associated with the permitting process.

[21] The "certain future regulations" were in reference to those regulations issued pursuant to OCSLA and §§ 302 and 303 of the Department of Energy Organization Act. The "certain future regulations" did not contemplate or include "new" or "other" legislation outside the aforementioned. *Mobil Oil,* 530 U.S. at 616, 120 S.Ct. at 2433, 147 L.Ed.2d at 539.

paid for "specific temporal restrictions" on the federal government's power to avoid subjecting the oil companies to unknown future requirements or regulations. *Mobil Oil,* 530 U.S. at 617, 120 S.Ct. at 2434, 147 L.Ed.2d at 539.

¶54 In contrast to the facts in *Mobil Oil,* the Venture: (1) made no extraordinary payments in exchange for special protection or limitations; (2) made no "up-front bonus payment" for which it could seek restitution, and instead made annual rental payments of approximately three dollars per acre; (3) did not bargain for language in the Mineral Leases that would protect it from potentially adverse regulations based on a future statute; and (4) sought damages for breach of contract which encompassed the "total of monies invested by it in development," including the total value of its mineral interests, whereas the oil companies in *Mobil Oil* sought restitution only as to their up-front bonus payment, *excluding* annual rental payments and other "soft costs" incurred due to the permitting process. While leases should be interpreted to avoid a result whereby a private party invests millions to "buy next to nothing" from the government, they should likewise not be construed to buy something certain when the private party, in fact, bought "a risk" with the potential of gaining something. Thus, in light of these distinguishing factors, it is clear that the Venture's reliance on *Mobil Oil* is unavailing.

¶55 In summary, we conclude that, although the District Court erred in concluding that the parties'

agreement was not substantially impaired by the passage of I-137, it nonetheless correctly held that the Contracts Clause was not violated because, as set forth herein, the second and third prongs of the analysis demonstrate that I-137 was reasonably related to the legitimate and significant purpose of protecting the environment. "[A] district court's decision will not be reversed or remanded when the eventual result of the case would be the same without the error." *In re S.C.* (1994), 264 Mont. 24, 30, 869 P.2d 266, 269 (citing *In re Marriage of Cannon* (1985), 215 Mont. 272, 275, 697 P.2d 901, 903). Therefore, we affirm the District Court's holding.

¶56 Did the District Court err in concluding that the DNRC properly terminated the Venture's mineral leases prior to resolution of its legal challenge to I-137?

¶57 It is helpful here to recap certain facts pertaining to the termination of the Venture's Mineral Leases. On September 23, 1998, the DNRC notified the Venture by letter that its failure to satisfy certain DEQ requirements constituted a breach of the 1994 Lease Amendment, and if not cured, would cause the primary lease terms to run and ultimately expire on February 23, 2000. Additionally, the DNRC informed the Venture that, in order to re-toll the running of the last seventeen months of the primary lease term, the Venture must: (1) pay all past-due EIS invoices; and (2) execute an acceptable MOA with the DEQ regarding preparation of the EIS. Though the Venture subsequently paid all past-due EIS invoices, the

DNRC determined that it had failed to actively pursue the permitting process with the DEQ. Consequently, on February 24, 2000, the DNRC notified the Venture that the primary lease term had lapsed and the Mineral Leases were thereby terminated. Two weeks later, the Venture administratively appealed that determination and on April 11, 2000, the Venture commenced litigation challenging the validity of I-137. On October 26, 2000, the DNRC's Director rejected the Venture's administrative appeal and affirmed the February 2000 termination of the Mineral Leases.

¶58 This Court determines whether an agency's decision may be reversed or modified only if the administrative findings, inferences, and conclusions are "clearly erroneous" in light of the evidence, in violation of statutory or constitutional authority, or an abuse of the exercise of discretion. Section 2-4-704, MCA. This Court applies a three-part test to determine whether an agency's findings are clearly erroneous: (1) after review of the record, the findings must be supported by substantial evidence; (2) if there is substantial evidence to support the findings, the Court will determine whether the agency misapprehended the effect of the evidence; and (3) even assuming the first two requirements are met, the Court may conclude that a finding is clearly erroneous when, in spite of evidence supporting it, a review of the record "leaves the [C]ourt with the definite and firm conviction that a mistake has been committed." *Hughes v. Mont. Bd. of Med. Examiners,* 2003 MT

305, ¶ 11, 318 Mont. 181, ¶ 11, 80 P.3d 415, ¶ 11. This Court will review a state agency's conclusions of law to determine whether the agency's interpretation of law is correct. *Williams Insulation Co. v. Dep't of Labor & Indus.*, 2003 MT 72, ¶ 22, 314 Mont. 523, ¶ 22, 67 P.3d 262, ¶ 22.

¶59 The Venture argues that the DNRC erred when it determined that the Venture had failed to pursue the permitting process and terminated the Mineral Leases. The Venture asserts that the DNRC should have extended the primary terms of the Mineral Leases to include the time necessary to seek the invalidation of I-137, since such pursuit acted as an "authorization, order or clearance required for the Development or Production" under the definition of "Permit"[22] in the Lease Amendment. The Venture claims that, after it paid all its past-due EIS invoices by December 31, 1998, it actively pursued the permitting process by seeking judicial invalidation of I-137, and therefore, the conclusion reached by the DNRC and, subsequently, by the District Court, that it had done "nothing" during the seventeen-month period commencing September 23, 1998, is legally and factually erroneous. Moreover, the Venture challenges the DNRC Director's determination that the Venture's interpretation of the Mineral Leases would lead

---

[22] "Permits" as defined in the Lease Amendment refers to "all federal, state and local licenses, permits, consents, authorizations, orders or clearances required for Development or Production."

to the absurd result of requiring that the permitting window remain open indefinitely.

¶60 The State urges this Court to follow the DNRC Director's interpretation of the Mineral Leases, and to likewise conclude that the Venture did nothing to pursue the permitting process during the seventeen-month period. The State claims the Venture took no action until it requested an administrative hearing on March 9, 2000, two weeks after the Mineral Leases expired on February 23, 2000. The State further notes that the DNRC hearing examiner found that the Venture's claim that it had no obligation to pursue the permitting process, in light of I-137, "flies in the face of the public policy of the state of Montana which is to get these mineral leases in operation," and would lead to the absurd result allowing the leases to run indefinitely, alleviating the Venture from taking any action whatsoever.

¶61 The Venture admits that it had to do "something" to pursue issuance of the permits. It is uncontested that the Venture paid its delinquent balance regarding the EIS fees, and it is likewise uncontested that the Venture filed a lawsuit in April 2000, challenging the validity of I-137, which the Venture claims constituted a pursuit of the permitting process. The issue therefore becomes a question of law: whether the Venture's challenges to I-137 constitutes the active pursuit of the permitting process.

¶62 We are hard pressed to conclude that judicially challenging a voter initiative, particularly without

agreement with the agency, constitutes administrative action in pursuit of the permitting process. According to several affidavits filed on behalf of the State, prior to the expiration of the Mineral Lease terms on February 23, 2000, the Venture: (1) failed to obtain a final permit; (2) did not amend its application to propose an alternate legal method of gold recovery; (3) did not reach a MOA to further fund continued preparation of the EIS; (4) did not legally seek to compel the DEQ to complete the preparation of the EIS; (5) did not seek any decision to grant or deny its application; (6) did not seek any administrative case hearings before the Division concerning its permit application; or (7) take any other action that would facilitate the permitting process while it sought to invalidate I-137. While pursuing all of these options may not have been necessary in order to "actively pursue" the permitting process, it is clear that the Venture was not limited to simply bringing a legal challenge to I-137 while doing nothing before the agency. We cannot conclude, therefore, that the DNRC and District Court's conclusion of law that the Venture failed to actively pursue the permitting process before the agency was erroneous. Challenging the validity of a voter-passed initiative under these circumstances, without more, does not constitute an administrative act of pursuing a permit. Therefore, the DNRC was not obligated to extend the primary terms of the Mineral Leases to include the time necessary for the Venture to seek the invalidation of I-137. Consequently, we conclude the Mineral Leases were properly terminated on February 23, 2000.

¶63 Alternatively, the Venture contends that the contractual doctrine of supervening impracticability suspended its obligations as specified in the February 24, 2000, letter from the DNRC. However, because we conclude the Venture failed to pursue the administrative process and, therefore, the Mineral Leases were properly terminated on February 23, 2000, we need not address this issue.

¶64 Finally, the Venture argues that the District Court failed to properly consider whether the lease terms should have been extended pursuant to Rule 36.25.605, ARM, which provides that:

> The board shall extend the term of the lease if it determines that a failure to produce in paying quantities is a result of factors beyond the control of the lessee such as but not limited to a national emergency or a temporary decrease in the price at which the particular metalliferous mineral or gem can be sold.

The Venture explains that, pursuant to the Restatement (Second) of Contracts and regulatory statement, performance obligations made impracticable by I-137 should be suspended during the time required for a final ruling on the law's validity, which is a finite period of time.

¶65 However, it was only after the Mineral Lease terms had expired, thereby terminating the leases entirely, that the Venture sought an extension of the lease term by invoking Rule 36.25.605, ARM. The

DNRC Director concluded that the Venture's request was untimely, and we agree. Therefore, we conclude that the District Court correctly upheld the DNRC's termination of the Mineral Leases.

¶66 The judgment entered by the District Court is affirmed.

/S/ JIM RICE

We Concur:

/S/ KARLA M. GRAY
/S/ PATRICIA O. COTTER
/S/ W. WILLIAM LEAPHART
/S/ JOHN WARNER

Justice James C. Nelson
Concurs.

¶67 I concur in our Opinion except for certain parts of the discussion in ¶¶ 44, 45 and 48.

¶68 Basically, I agree with the State's argument and interpretation of paragraph 7 of the agreement, and I disagree with our conclusion that the passage of I-137 resulted in a substantial impairment of the Venture's contractual relationship with the State.

¶69 As noted, paragraph 7 provides that the Venture shall fully comply with "all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation." For the Venture to say that it never agreed to be bound by laws which would

completely ban the use of the cyanide heap leaching process flies in the face of paragraph 7. Indeed, the Venture did, in fact, agree to be bound – *without limitation* – by all applicable laws, rules and regulations including those protecting the environment. If the Venture signed the agreement with qualifications, exceptions or caveats in mind, it had the obligation to disclose those to the State and to negotiate the contract terms accordingly.

¶70 Furthermore, I disagree with our conclusion that the Venture could not reasonably have anticipated I-137. The mining industry is one of the most heavily regulated industries in the State and has been for years. This regulation has, for the most part, become stricter over the years, due in no small measure, to environmental disasters resulting from poor mining practices, failed technology, failed economics, and taxpayers becoming increasingly fed up with having to pick up the pieces in the form of millions upon millions of dollars in clean up costs. The Court's apparent adoption of the statement that "cyanide heap leaching has been shown to be safer than other methods" to the contrary, the people of this State have twice exercised their collective judgment and have soundly rejected that notion. In this frame of reference, I am hard put to join the Court's conclusion that the passage of I-137 should have or did, in fact, come as any great surprise.

¶71 Finally, the federal Contracts Clause, Article I, Section 10 – after which our own Article II, Section 31 is modeled – was historically adopted and construed

with a focus on legislation designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy. *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987), 480 U.S. 470, 503, 107 S.Ct. 1232, 1251, 94 L.Ed.2d 472 (citations omitted). As we note, notwithstanding its facially absolute language, the federal Contracts Clause has long been interpreted so as to accommodate the inherent police power of the State "to safeguard the vital interests of its people." *Home Bldg. & Loan Ass'n v. Blaisdell* (1934), 290 U.S. 398, 434, 54 S.Ct. 231, 239, 78 L.Ed. 413. The clause is not read literally. *W.B. Worthen Co. v. Thomas* (1934), 292 U.S. 426, 433, 54 S.Ct. 816, 818, 78 L.Ed. 1344. Moreover, "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson County Water Co. v. McCarter* (1908), 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828.

¶72 Here, the State leased a mineral estate to the Venture and, with that, the opportunity to go through the expensive, lengthy, highly regulated process to apply for and, maybe, obtain a permit to mine. There was no guarantee that this process would be successful anymore than there was any guarantee that the mining venture itself would succeed. The State did not repudiate its agreement with the Venture. Rather, and leaving aside its other problems, it was the Venture that, in an increasingly strict regulatory environment, determined to mine using a process that was unacceptable to the people of Montana.

¶73 The Contracts Clause must accommodate the inherent police power of the State. Here, that power was exercised by the people pursuant to Article II, Sections 1 and 2 and Article III, Section 4, to prohibit a mining process which they collectively determined posed unacceptable risks to the environment and to their rights under Article II, Section 3 and Article IX, Section 1.

¶74 While I agree with most of our Contracts Clause analysis and with the result thereof, I do not concur with the statements in ¶¶ 44, 45 and 48, aforementioned, nor do I agree that the Venture suffered a substantial impairment of contract as a result of the passage of I-137.

¶75 With those qualifications, I concur.

/S/ JAMES C. NELSON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

SEVEN-UP PETE VENTURE, an Arizona partnership, d/b/a SEVEN-UP PETE JOINT VENTURE; CANYON RESOURCES CORPORATION, a Delaware Corporation; JEAN MUIR; DR. IRENE HUNTER; DAVID MUIR; ALICE CANFIELD; TONY PALAORO; JUNE E. ROTHE-BARNESON; AMAZON MINING COMPANY, a Montana Partnership; PAUL ANTONIOLI; STEPHEN ANTONIOLI; and JAMES E. HOSKINS,

Plaintiffs,

vs.

MARC RACICOT, Governor of the State of Montana, and MARK SIMONICH, Director of the Montana Department of Environmental Quality,

Defendants.

CV 00-13-H-CCL

ORDER

(Filed Mar. 25, 2004)

* * *

The Clerk of Court has notified the undersigned that this case has been pending for three years or

more. The case was stayed upon Plaintiffs' motion on September 4, 2001, to allow Plaintiffs to litigate their claims in state court, with the possibility that Plaintiffs may return to this Court to reassert their federal claims. Given the length of time that has passed since the stay order was entered, however, it appears to the Court that this case should be closed administratively, for statistical purposes only.

Accordingly,

IT IS HEREBY ORDERED that the Clerk shall perform an administrative closure of this case for statistical purposes. The Plaintiffs may file a motion to reopen the case after they have completed their state court litigation.

The clerk is directed to notify the parties of entry of this order.

Done and dated this 24th day of March, 2004.

/s/ Charles C. Lovell
CHARLES C. LOVELL
Senior United States
District Judge

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY
Cause No. BDV-2000-250

ORDER

SEVEN-UP PETE JOINT VENTURE, an Arizona general partnership, d/b/a SEVEN-UP PETE JOINT VENTURE, CANYON RESOURCES CORPORATION, a Delaware corporation, JEAN MURI [sic], DR. IRENE HUNTER, DAVID MUIR, ALICE CANFIELD, TONY PALAORO, JUNE E. ROTHE-BARNESON, AMAZON MINING COMPANY, a Montana Partnership, PAUL ANTONIOLI, STEPHEN ANTONIOLI, and JAMES E. HOSKINS,

Plaintiffs,

v.

THE STATE OF MONTANA,

Defendant.

FACTUAL BACKGROUND

This case arises out of the November 1998 passage of Initiative 137 (I-137) by the voters of Montana. I-137 has been codified at Section 82-4-390, MCA, which provides:

> **Cyanide heap and vat leach open-pit gold and silver mining prohibited.** (1) Open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore-processing reagents is prohibited except as described in subsection (2).

> (2) A mine described in this section operating on November 3, 1998, may continue operating under its existing operating permit or any amended permit that is necessary for the continued operation of the mine.

The principal Plaintiff in this action is the Seven-Up Pete Venture (hereinafter the Venture). The Venture is the successor to six mineral leases located on school trust lands near Lincoln, Montana. The mineral leases were initially issued to Western Energy Company over a period extending from 1986 through 1989. In 1991, the Venture became the successor to Western Energy. The Venture also owns surface and mineral interests not associated with the aforementioned mineral leases.

The individually named Plaintiffs have interests in surface and mineral interests in the general vicinity of Lincoln, Montana, but do not have an interest in the six mineral leases.

Each of the mineral leases contains a primary term of ten years and a secondary term that commences with and continues through the production of minerals. Continuation of the leases beyond the primary term requires the production of paying quantities of minerals. The leases also prohibit any mining until the state of Montana has approved an operating plan submitted by the lessee.

In 1992, the Venture obtained a [sic] exploration license from the state of Montana via the Montana Metal Mine Reclamation Act. Section 82-4-301, MCA.

Of great concern to the parties in these proceedings is paragraph number 7 in the leases which provides: "The lessee shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation."

Shortly, the Court will set forth many subsequent agreements and letters exchanged between the Venture and the state of Montana. None of these subsequent letters, agreements and documents in any way modified paragraph 7 of the leases.

None of the leases mentioned above specifically authorized or mentioned a particular method of mining. The second paragraph of the leases provides: "The lessor, in consideration of the annual rentals provided for herein, the royalties to be paid, and the covenants to be kept and performed by the lessee, leases to the lessee for the purpose of mining metalliferous minerals and or gems as described below, all the lands described as follows. . . ."

The Venture has gone to great lengths to argue that the contract between the parties includes more than the leases mentioned above. The Court, and the State in its response, agree that the later documents can be included as part of the "contract" between the parties. However, remaining at some dispute is the exact nature of the agreement between the parties.

On November 21, 1994, the Venture submitted an application for an operating permit. Pursuant to Section 82-4-337, MCA, the state of Montana has 60

days to render a decision on the application. The 60-day deadline was extended by the parties by a number of agreements. The last one signed by the parties was on July 22, 1998, and extended the decisional deadline to January 31, 2000.

The project proposed by the Venture was of a grand scale. Therefore, it required an environmental impact statement (EIS) pursuant to Section 75-1-201, MCA. The preparation of the EIS has been a gargantuan task.

The parties entered into a Memorandum of Agreement (MOA) on November 1, 1993. The MOA generally provided guidance as to the further preparation of the EIS for the Venture's proposed mining operations.

The Court would note that the EIS has never been completed. According to the state of Montana, the Venture failed to keep current on invoices submitted to it for completion of the EIS.

In August 1994, the parties entered into a Mineral Lease Amendment Agreement. This agreement extended the primary terms of the mineral leases by a period equal to the time required for the permitting process. Section 6 of the Mineral Lease Amendment Agreement provided, in part: "Except as expressly amended hereby, the Mineral Leases shall remain in full force and effect according to their terms."

The Mineral Lease Amendment Agreement contained what the parties have denominated a

"delay rental provision" that provided a $150,000 per month payment to the state of Montana. Also, the parties seem to agree that once the mine became operational, the state of Montana could reasonably expect a $5 million annual royalty from the Venture.

The Venture has gone to great lengths in its papers responding to the State's motion for summary judgment to argue that the state of Montana knew that the Venture's proposal was for an open-pit cyanide heap-leach operation. The State does not dispute this fact, and this Court also acknowledges that it is clear that the state of Montana knew the nature of the Venture's proposal. For example, the Court has seen the December 13, 1993, request for proposals (RFP) for the EIS. This RFP acknowledges that the proposed project would use open-pit mining and heap-leaching.

Also, the Court has seen a letter to the Venture from Monte Mason, chief of the Minerals Management Bureau of the Department of State Lands. This letter was sent after the aforementioned Mineral Lease Amendment Agreement was entered into by the parties. Paragraph number 1 of the letter provided "Lessee may propose extraction of gold and silver from ore by means of a cyanide heap-leach closed solution system." It should also be noted that the last sentence of the first un-numbered paragraph of the aforementioned letter provided: "This letter is not an endorsement or approval of any facet of Lessee's contemplated mining plan." Thus, it is clear that

the state of Montana knew that the Venture was proposing an open-pit, cyanide heap-leach operation.

Work on the EIS was stopped by the state of Montana on July 2, 1998, since the Venture was not paying the State's invoices. In September 1998, the state of Montana sent the Venture a letter indicating that the permitting period for the operating permit was at an end and that the leases' primary term had again begun to run. The unpaid invoices were paid in full by the Venture on December 31, 1998. In February 2000, the state of Montana declared the leases to be terminated.

PROCEDURAL BACKGROUND

This case has previously been described by this Court as an "epic struggle." Therefore, this Court can scarcely begin to provide a detailed procedural background. The interested reader, if more detail is desired, is invited to examine the Court file and this Court's earlier order.

This matter began with the filing of a 27-page amended complaint and petition for judicial review on November 28, 2000. The Court earlier addressed the state of Montana's partial motion to dismiss by this Court's November 1, 2001, Order. In that order, this Court dismissed Counts One, Two, Three, and Five with prejudice.

Before moving on, the Court should note two items of the complaint that might prove to be of

interest. First, paragraph 29 of the complaint acknowledges that since at least 1970, the use of cyanide with respect to the processing of ores has been subject to various regulations in the state of Montana. Further, paragraph 83 alleges that there is no gold or silver recovery process other than open-pit mining combined with cyanide heap-leaching which would allow the economically viable production of ores from the mineral leases here involved.

Left before the Court are a variety of counts that are generally classified as the taking counts, the contract counts and the judicial review counts. Specifically, the remaining counts are as follows:

Count Four alleges that I-137 violates the United States and Montana Constitutions by impairing the obligations of the contracts.

Count Six alleges that if the Court should find that I-137 is a permissible enactment, it constitutes a permanent taking of property from the Venture.

Counts Seven and Eight allege that if I-137 is a valid enactment, it constitutes a taking against the individually named Plaintiffs and Amazon Mining Company in violation of the Montana Constitution.

Count Nine alleges that if I-137 is found to be an invalid legislative enactment, it constitutes a temporary taking from the Venture during the period of time that I-137 was the law in the state of Montana.

Count Ten alleges a similar temporary taking from Plaintiff Canyon Resources.

Count Eleven alleges a breach of contract whereby the Plaintiffs allege that, by the enactment of I-137, the State breached its obligation to the Venture by ensuring the Venture that it would get a decision approving, denying, or approving its application with modifications, and that the State would not change the decisional statutes prior to such decision in a way such as to preclude approval of the application.

Count Twelve alleges a breach of the covenant of good faith and fair dealing in two ways. The first violation, according to Plaintiffs, occurs through the allegations of Count Eleven. The second violation alleges that during the proposal and pendency of I-137, the State signaled potential breach of its contractual assurance to the Venture. According to Plaintiffs, this created a situation wherein the Venture was required to mitigate its potential damages and was therefore justified in not making further EIS payments pending the outcome of the I-137 election. This resulted, according to Plaintiffs, in the September 1998 declaration by the State that the primary terms of the leases had recommenced.

Count Thirteen seeks judicial review, pursuant to Section 2-4-702, MCA, of the Department of Natural Resources and Conservation's decision canceling Plaintiffs leases mentioned above, as affirmed by Hearing Examiner Clinch on October 26, 2000.

Count Fourteen seeks declaratory judgment that the state of Montana, through the DNRC and

Hearing Examiner Clinch's order of October 26, 2000, violated its contractual obligations to the Venture, that the Venture's leases are in good standing and seeking this Court's order requiring the State to specifically perform the mineral leases as amended by the various post-lease documents mentioned above.

MOTION FOR SUMMARY JUDGMENT

Standard of Review

Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. *Minnie v. City of Roundup*, 257 Mont. 429, 431, 849 P.2d 212, 214 (1993). The burden then shifts to the party opposing the motion to show, by more than mere denial and speculation, that there are genuine issues for trial. *Sunset Point v. Stuc-O-Flex Int'l*, 287 Mont. 388, 392, 954 P.2d 1156, 1159 (1998). The party opposing the summary judgment is entitled to have any inferences drawn from the factual record resolved in his or her favor. Rule 56(c), M.R.Civ.P.

Summary judgment motions encourage judicial economy through the elimination of unnecessary trial, delay and expense. *Bonawitz v. Bourke*, 173

Mont. 179, 182, 567 P.2d 32, 33 (1977). However, summary judgment is not to be utilized to deny the parties an opportunity to try their cases before a jury. *Brohman v. State*, 230 Mont. 198, 202, 749 P.2d 67, 70 (1988). "Summary judgment is an extreme remedy and should never be substituted for a trial if a material fact controversy exists." *Clark v. Eagle Sys., Inc.*, 279 Mont. 279, 283, 927 P.2d 995, 997 (1996) (citations omitted). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. *Rogers v. Swingley*, 206 Mont. 306, 670 P.2d 1386 (1983); *Cheyenne Western Bank v. Young*, 179 Mont. 492, 587 P.2d 401 (1978); *Kober v Stewart*, 148 Mont. 117, 122, 417 P.2d 476, 479 (1966).

Contract-Based Claims

The Venture has alleged that I-137 caused a breach of the State's contractual obligations: Count Four (unconstitutional impairment of contracts), Count Eleven (breach of contract), Count Twelve (breach of implied covenant of good faith and fair dealing), and Count Fourteen (specific performance).

In Count Four, Plaintiffs allege that I-137 unconstitutionally impairs its contractual obligations in violation of the Montana and Federal Constitutions. The contract clauses of the Montana and United States Constitutions have generally been interpreted as "interchangeable guarantees against legislation impairing the obligation of contract." *Carmichael v. Workers' Compensation Ct.*, 234 Mont. 410, 414, 763

P.2d 1122, 1125 (1988) (citations omitted). A contracts clause analysis requires a three-step inquiry: First, a court must determine whether the state law substantially impairs the contractual relationship. Second, a court must determine whether the state has a significant and legitimate purpose for the law. Lastly, a court must determine whether the law imposes reasonable conditions that are reasonably related to achieving the law's purpose. *Id.*

1. Substantial Impairment

The initial inquiry is whether I-137 substantially impaired the contract between the State and the Venture. This inquiry has three components: whether there is a contractual relationship; whether a change in law impairs that contractual relationship; and whether the impairment is substantial. *General Motors Corp. v. Romein*, 503 U.S. 181, 186. There is no dispute that a contractual relationship existed between the State and the Venture. However, the State argues that I-137 worked no impairment of that relationship.

In support of this contention, the State relies on Paragraph 7 of the mineral leases which provides that the Venture "shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation." The State maintains that the prohibition against open-pit mining for gold or silver using heap-leaching or

vat-leaching with cyanide ore-processing reagents contained in I-137 is a state law aimed at environmental protection with which the Venture expressly agreed to comply. Therefore, I-137 could not have impaired their contractual relationship.

The Venture responds that the contractual relationship between it and the State is comprised of many agreements that, when considered together, provide no basis for the State's contention that the Venture agreed to be bound by a subsequent law prohibiting open-pit, cyanide leach mining. The Venture contends that its contractual relationship consists of not merely the mineral leases, but also includes the 1993 Memorandum of Agreement, the 1994 Mineral Lease Amendment Agreement, the "letter agreement," and the "letter of clarification." The Venture argues that when the contractual relationship is seen as a whole, it is clear that the parties contemplated that the Venture would mine gold and silver ore by way of an open pit and use cyanide leaching to process the ore.

As noted earlier, there is no dispute but that both parties knew that the Venture was seeking a permit for an open-pit mine utilizing cyanide heap-leach processing of the ore. As noted above, our first task is to decide whether I-137 substantially impaired the parties' contractual relationship. One item of consideration in this regard is whether the industry has been regulated in the past. *See Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 411 (1983). There is no doubt that the mining industry is

a heavily regulated industry. *See Associated Press, Inc. v. Mont. Dept. of Revenue*, 2000 MT 160, ¶ 41, 300 Mont. 233, ¶ 41, 41 4 P.3d 5, ¶ 41. The Venture agreed in the mineral leases to be bound by future environmental regulations. The Venture could have negotiated for protection from the possibility that its project might become illegal, possibly by using some damage agreement, but did not. *See Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 557 (Cal. Ct. App. 2001).

As the State notes, the facts of *Stop Oil* are remarkably similar to the instant case and shed some light on this issue. In 1932, the voters of Hermosa Beach enacted a ban on all oil and gas operations. In 1984, the voters adopted two ballot measures creating exceptions to the ban on oil exploration and production for two publicly-owned sites within the city. In 1985, the city enacted the Hermosa Beach Oil Code which, among other things, established a permit system for drilling and oil recovery. The city eventually entered into a lease agreement with Macpherson Oil Company which granted the lessee the right to conduct oil and gas operations within the city.

Similar to the instant case, the lease required Macpherson to obtain all necessary permits and to comply with all laws, rules and regulations. *Id.* at 556. Macpherson prepared an environmental impact statement. The city issued a conditional use permit in 1993. The State Lands Commission also approved the lease. All that remained was a coastal development permit from the California Coastal Commission. In

February 1998, the commission authorized its staff to issue a permit once certain conditions had been satisfied.

Beginning in 1994, the Hermosa Beach Stop Oil Coalition began a campaign to qualify a ballot initiative to end the Macpherson project and to reinstate the comprehensive ban on oil drilling in the city. The measure, Proposition E, appeared on the November 1995 ballot. Proposition E's statement of intent stated that "[c]lean water, pure air, and a safe environment are vital to maintaining the quality of life" and that these goals require that drilling and production of oil be prohibited. Proposition E was approved with 56 percent of the vote.

Notwithstanding the adoption of Proposition E, the city continued to perform under its lease with Macpherson because it was concerned about the legality of terminating the lease. The Stop Oil Coalition commenced a lawsuit for declaratory and injunctive relief to require the city to apply Proposition E to the Macpherson project. The trial court held that the prohibition applied to the Macpherson project, but that termination of the lease would constitute an unconstitutional impairment of contract. On appeal, the court noted that the oil exploration industry is heavily regulated and that by agreeing to abide by all applicable laws and to obtain the proper permits, Macpherson explicitly recognized the city's authority to regulate the project in the future. *Id.* at 557. The court concluded that Macpherson could have bargained for a provision imposing on the city the risk of

a performance-defeating change in the law. *Id.* Against this backdrop, the court concluded that "these factors could well justify a conclusion that Proposition E did not effect any substantial impairment." *Id.*

This Court concludes that like in *Stop Oil* there was no unconstitutional impairment of contract in this case. Of crucial import to this Court is the fact that paragraph 7 of the mining leases put the Venture on clear notice that it could be subject to future environmental laws. The Venture is certainly a most sophisticated party and could have negotiated some sort of protection for itself.

Also of great concern to this Court is exactly what constitutes the contract between these parties. None of the written documents between these parties obligates the state of Montana to allow open-pit mining along with cyanide heap-leaching on the land subject to the mineral leases. While this may have been what the Venture intended, the state of Montana nowhere agreed to allow such a proposal. Central to the Venture's claim here is its allegation in paragraph 138 of the amended complaint where it states:

> By the enactment of I-137, the State breached its contractual assurance that the Venture would get a decision approving, denying[,] or approving its permit application with modifications, and that the State would not change the decisional statutes prior to

> such decision, in a way so as to preclude approval of the application.

While this is certainly the expectation of the Venture, the State made no such agreement. These parties have entered into any number of written agreements, memorandums and letters of understanding. The contractual language hoped to be inserted by the Venture, just quoted, appears in none of those documents. Thus, the impairment was not of the parties' contract, but was of the Venture's desires.

The Court here is mindful that certain other parties have exempted themselves from future regulation of contractual activities. *See, e.g., Mobile Oil Exploration & Producing Southeast v. United States*, 530 U.S. 604 (2000). In that case, the plaintiff negotiated for a clause exempting themselves from future regulations by subjecting themselves only to those regulations in effect at the time the lease was signed. Another interesting case in this regard is *Energy Reserves Group*, 459 U.S. 400. That case provides two principals that support this Court's contention. First, the court held that: "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Id.* at 411. In other words, the Venture cannot remove itself from future environmental regulations merely by signing the subject mineral leases with the state of Montana. The contracts in *Energy Reserves Group* expressly recognized the existence of extensive regulation and provided that any contractual terms were subject to relevant

present and future state and federal law. The supreme court noted that this language could be interpreted to incorporate all future state regulation and thus dispose of the contract clause claim. *Id.* at 416.

This Court also notes the holding by the Montana Supreme Court in *Wallace v. Dept. of Fish, Wildlife & Parks*, 269 Mont. 364, 889 P.2d 817 (1995). In that case, the plaintiffs applied for a license to expand their elk ranching operation. However, between the time of the application and the time for the decision, the applicable law had changed. The Montana Supreme Court held that in deciding the license application, the State would use the law in effect at the time of the decision despite the fact that it may have changed since the date of the application. *Id.* at 368, 889 P.2d at 820. The Court recognizes that this is not a contract case, but it is instructive.

Having disposed of the contract claim by finding that there was no substantial impairment of the contractual relationship, the Court need not address the other two prongs of the three-part test announced in *Carmichael*. However, the Court will briefly address them out of an abundance of caution.

First, the Court must determine if there is a significant and legitimate purpose for the law (here I-137), and then the Court must determine if it imposes reasonable conditions which are reasonably related to achieving the legitimate purpose. It is clear that the State has a legitimate interest in protecting the environment. Indeed, its legitimate interest in

guarding against imperfectly understood environmental risks, even though those risks may ultimately prove to be negligible. *Maine v. Taylor*, 477 U.S. 131, 148 (1986). The Montana Supreme Court has held that regulations protecting the State's environment are reasonable exercises of the police power. *Western Energy Co. v. Genie Land Co.*, 195 Mont. 202, 211, 635 P.2d 1297, 1302 (1981).

Here, the Court notes the 1998 voter information pamphlet that was published in support of I-137. That pamphlet provided that the intent of I-137 was to guard against potential State environmental liabilities, which might be reduced if cyanide leaching for mineral processing was prohibited. Protection of the environment is a significant and legitimate purpose.

Next, the Court must see if the condition of I-137 is reasonable and whether it is reasonably related to achieving that legitimate purpose. Again, the Court finds in the affirmative. In this regard, the Court notes that it must grant deference to the State's judgment on what is reasonable and necessary in matters such as this. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23 (1977). Of crucial importance here is a determination of what power the State is exercising. The usual deference given to the State's judgment on what is reasonable and necessary is not appropriate if, in general, the State is a party to the contract. If the regulation affects the State's financial obligation, it is generally a taxing and spending power being exercised, and not the police power. In

such cases, the self-interest of the State is at issue and the State should not be granted the usual deference. Here, although the State is a party, the Court has already noted the annual royalties that the State lost pursuant to the passage of I-137 and the monthly delayed royalties that were lost. Indeed, the Venture, at page 31 of its brief opposing summary judgment, indicates that the State's total royalty lost by the passage of I-137 is between 70 and 80 million dollars. Thus, the State's financial interest is not at issue in this case. It is the police power of the State at issue here, and not its taxing and spending power. Such being the case, the regulation is entitled to the usual deference to the State's judgment on reasonableness and necessity. *See Stop Oil*, 86 Cal. App. 4th at 561.

Therefore, this Court rules that I-137 did not impair the obligation of any contract between the State and the Venture. Primarily this is so because the parties never had a specific written contract that forbade the State from changing its environmental regulations. On the contrary, the written contract between the parties acknowledged that there might be a change and, if there was, that the Venture would be subject to any such change.

With the collapse of Count Four (alleged impairment of the obligation of contracts), Plaintiffs' remaining contracts claims also fail. For example, Count Eleven alleges a breach of contract. However, the basis for the breach and agreement that the decisional statutes would not change before a permanent decision was made was never a part of the

contract between these parties. Further, the alleged breach of the covenant of good faith and fair dealing alleged in Count Twelve also falls, since in order for it to exist at all, there must be an initial breach of a contract. *Montana Bank, N.A. v. Ralph Meyers & Son*, 236 Mont. 236, 245, 769 P.2d 1208, 1214 (1989). Further, Count Fourteen which seeks specific performance also must fail since this Court has found that there was no breach of contract between the parties. Thus, the State is entitled to summary judgment on Counts Four, Eleven, Twelve and Fourteen.

2. Takings Claims (Counts Six, Seven, Eight, Nine, and Ten)

In the second category, the Venture has alleged that by passing I-137, the State took their property.

Article II, Section 29 of the Montana Constitution provides that private property shall not be taken for public use without just compensation. The scope of Montana's constitutional takings protections has been determined with reference to decisions interpreting federal takings protections. *See Kudloff v. City of Billings*, 260 Mont. 371, 860 P.2d 140 (1993). This provision protects private property owners from absolute conversion, by way of condemnation, as well as uncompensated takings of property by way of regulation. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). With regard to regulatory takings, courts have had little success in devising any set formula for determining when governmental

regulation of private property amounts to a taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The United States Supreme Court has identified two specific circumstances in which a government regulation is categorically a taking: (1) regulations that compel a property owner to suffer a permanent physical "invasion" or "occupation" of his or her property, *see e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); and (2) regulations that deny "all economically beneficial or productive use of land." *Lucas* at 1015. In the absence of a categorical taking, the United States Supreme Court has repeatedly recognized that "whether a particular restriction [amounts to a taking] depends largely upon the particular circumstances [of each] case." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (quotation omitted). In this regard, the supreme court and lower courts have indicated that most regulatory takings cases should be resolved by balancing the public and private interests at stake, with three primary factors weighing in the balance: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Penn Central*, 438 U.S. at 124.

Of crucial importance here is a determination of what, if anything, was taken from the Venture. The Venture alleges that when I-137 was passed, it had a right to pursue the approvals necessary to commence

its open-pit cyanide heap-leaching mining process. However, this is not necessarily true since, as has been noted earlier in this decision, none of the contractual documents in this case granted the Venture that right. It is true that the Venture was processing an application, but until that application was approved, the Venture had only the right to pursue its application, subject to existing and future environmental regulations. This is not a case where the State stopped an on-going mine operation. Indeed, such operations are specifically excluded from the purview of I-137. Further, this is not a case where the State took away a permit, since none had been issued.

The leases did not create a property right that was taken away by I-137. Pursuant to those leases, the Venture could begin mining operations only if they received an operating permit which, pursuant to the leases themselves, was subject to all applicable environmental regulations.

In any takings analysis, one must carefully analyze what is actually being taken away. Although the law of takings has proved extraordinarily vexing for the courts, at least one settled principal remains and that is:

> [E]ven if government action might otherwise constitute a taking of property, it will not if it is shown that what the government prohibits does not amount to a private property right in the first place. Said another way, an owner cannot maintain an action for loss of property that it did not ever have.

Kinross Copper Co v. Oregon, 981 P.2d 833, 836-37 (1999); *Stevens v. City of Cannon Beach*, 854 P.2d 449 (1993) *cert. denied* 510 U.S. 1207 (1994); *Lucas*, 505 U.S. 1003.

As noted by the *Kinross* court, "the determinative inquiry is whether what the government has prohibited is itself a property right." *Kinross*, 981 P.2d at 837.

Here, what I-137 prohibited was open-pit cyanide heap-leach mining. The Venture did not have a property right to conduct that type of mining on the leases here in question. It had not even obtained a [sic] operating permit to mine, and its activities were subject to all environmental regulations.

As noted above, the Venture never possessed a contract with the state of Montana that said they could mine in the manner which they desired. The leases gave the Venture the exclusive right to submit an application for an operating permit on the land subject to the leases. The leases did not pre-approve any particular type of mining operation. In addition, it should be noted that I-137 does not affect the Venture's other potential uses of the mineral leases or a way to exploit them.

Thus, this Court concludes that there was no unconstitutional taking of any property right that Plaintiffs owned in the mining leases. Such being the case, the state of Montana is entitled to summary judgment on Counts Six, Seven, Eight, Nine, and Ten.

PETITION FOR JUDICIAL REVIEW

Also before this Court is the Venture's appeal of the hearing examiner's October 26, 2000 order. Many of the facts giving rise to the petition for judicial review have been mentioned elsewhere in this decision. However, the Court will mention some of them again as the need may arise.

On September 23, 1998, the DNRC notified the Venture that:

> "any period of time beyond September 23, 1998 does not constitute time required for the permitting decision under . . . the August 26, 1994 Amendment Agreement unless all past-due EIS invoices are paid and an acceptable Memorandum of Agreement is executed to fund the preparation of the EIS. After September 23, 1998, the remaining unexpired primary term of seventeen months would begin to run for each of the above-described mineral leases.

(State's Ex. 1.)[1]

The next item in the contested case record is State's Exhibit 2 which is the DNRC's February 24, 2000 letter advising the Venture that the leases had terminated. That letter noted that since the earlier letter of September 23, 1998, the past-due EIS invoices had been paid, but a revised memorandum of

---

[1] Reference to exhibits in this portion of the Order refer to the administrative record on judicial review.

agreement had not been executed. Basically, the reason for the termination was a failure to pursue the permitting process. According to the affidavit of Warren McCullough, there had been no permitting efforts undertaken by the Venture after September 23, 1998. (*See* State's Ex. 23.) Further, the McCullough affidavit tells us that there was no mineral production from the leases.

After receiving the February 4, 2000 letter, the Venture, by letter dated March 9, 2000, requested a hearing. (State's Ex. 3.) No hearing was ever held. The hearing examiner issued an order on October 26, 2000 granting the State's motion for summary judgment. The hearing examiner noted that the parties had agreed to extend the running of the leases pending the permitting process, but he also noted that it would be against the public policy of the State to allow this to go on forever. The hearing examiner did note that the Venture did file suit seeking a declaration of the invalidity of I-137, but that did not occur until after the leases had terminated. The Venture also looked at alternate methods of mining the property, but did nothing else to pursue permitting the mining of the area pursuant to the leases.

As noted by the hearing examiner:

> If the Lessee had taken any action, administrative or otherwise, to further the permitting process, this outcome may have differed. The Lessee has not, however, presented any evidence that the Lessee took any steps within the administrative or judicial

> systems, sough [sic] no other remedy, nor undertook any substantive action to stem the procession of the permitting clock. . . . The requisite action must comprise something more than mere thoughts or discussions of what an action might be. . . . The Lessee had 17 months in which to contest the Department's September 23, 1998 decision, to seek judicial review or relief or in some manner to engage in the permitting process. The Lessee availed itself of none of these.

(State's Ex. 25.)

Standard of Review

A district court's review of an administrative agency's order is governed by the Montana Administrative Procedure Act. The standard of review for an agency decision is set forth in Section 2-4-704(2), MCA, which provides:

> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
>
> (a) the administrative findings, inferences, conclusions, or decisions are:
>
> (i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(b) findings of fact, upon issues essential to the decision, were not made although requested.

The Montana Supreme Court has adopted a three-part test to determine if a finding is clearly erroneous. *Weitz v. Montana Debt of Natural Resources and Conservation*, 284 Mont. 130, 943 P.2d 990 (1997). First, the Court is to review the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, the Court is to determine whether the agency misapprehended the effect of the evidence. Third, even if substantial evidence exists and the effect of the evidence has not been misapprehended, the Court still can determine that a finding is clearly erroneous "when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that mistake has been committed." *Weitz*, 284 Mont. at 133-34, 943 P.2d at 992. Conclusions of law, on the other hand,

are reviewed to determine if the agency's interpretation of the law is correct. *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, 474, 803 P.2d. 601,603 (1990).

Discussion

In reviewing the facts presented, the Court must deny the petition for judicial review. In the first instance, the Court is to give deference to interpretations of regulations and statutes by the agencies entrusted to enforce them. Certainly, Hearing Examiner Clinch has a valid point when he suggests that after notification of the resumption of the primary term in September 1998, the Venture could not just sit around for 17 months and do nothing, and then expect that the leases would continue to run indefinitely. Certainly, any such argument flies in the face of the public policy of the state of Montana which is to get these mineral leases in operation.

The Venture suggests that ARM 36.25.605 provides it with some relief. That provision states, in part:

> The board shall extend the term of the lease if it determines that a failure to produce in paying quantities is a result of factors beyond the control of the lessee such as but not limited to a national emergency or a temporary decrease in the price at which the particular metalliferous mineral or gem can be sold.

The provisions of I-137 which prohibit the very application upon which the Venture wants to proceed cannot be considered a factor beyond the control of the lessee.

Next, the Court agrees with the hearing examiner's conclusion that the administrative code provision just mentioned cannot be applied to a mineral lease prior to the initiation of production. The DNRC is the agency tasked with the decision to interpret administrative rules such as ARM 36.25.605, and its interpretation that it applies to producing mineral leases is entitled to considerable weight by this Court.

The hearing examiner was also concerned that the Venture did not raise the provisions of the rule prior to the expiration of the leases. Indeed, the Venture did nothing until the leases expired.

The Venture also suggests that pursuant to ARM 36.25.617, should a hearing be requested, the termination of the above-described leases should be stayed pending the outcome of the hearing. This Court finds that this provision has nothing to do with this case. A hearing was not requested until after the leases had been terminated. While the Court is under the impression that the parties have operated on the assumption that the leases have not terminated until this Court issues its ruling, the just mentioned administrative rule would apply if, let us say, a lease was to expire on Tuesday, and a hearing was requested on the matter on Monday. Here, we have a

situation where the leases terminated on Monday, and a hearing was requested on Tuesday. Thus, the aforementioned administrative rule has nothing to do with the hearing examiner's decision.

The Venture also suggests that many matters of a factual nature were improperly decided by the hearing examiner without holding a hearing. However, it is the impression of this Court that all parties were given ample opportunity to present any disputed issues of fact prior to the date of the hearing examiner's decision on summary judgment. The issues of fact that would have prevented the hearing examiner from making his decision would have to be material to his decision. The Venture has not shown this Court that any such material questions of fact existed. Thus, the question of whether the Venture intended to abandon its mineral leases is not material. The simple fact is that the Venture had a 17-month period within which to recommence its permitting process or do something else to stop the running of the primary term of the leases, but the Venture did nothing. This is a matter of interpreting the contract, not of divining the intent of the parties. In other words, the issue of abandonment is not material, because if it were, it would be to suggest that a mineral lease's primary term could continue indefinitely pending the permitting processes and the subjective intention of the lessee.

CONCLUSION

Therefore, based on the above, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. The state of Montana is GRANTED summary judgment on all remaining counts in this matter.

2. The Court hereby DENIES the Venture's request for judicial review and affirms the order of the hearing examiner dated October 26, 2000.

DATED this 9 day of December, 2002.

/s/ Jeffery M. Sherlock
District Court Judge

pc. Alan L. Joscelyn
Randy L. Parcel
Mike McGrath
Tommy H. Butler
John North
Karl J. Englund/Elizabeth A. Brennan/
Jack R. Tuholske

FILED Nov 1, 2001

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

Cause No. BDV 2000-250

ORDER ON STATE'S PARTIAL MOTION TO DISMISS, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT

SEVEN UP PETE VENTURE, an Arizona General Partnership, d/b/a, SEVEN UP PETE JOINT VENTURE, CANYON RESOURCES CORPORATION, a Delaware corporation, JEAN MUIR, DR. IRENE HUNTER, DAVID MUIR, ALICE CANFIELD, TONY PALAORO, JUNE E. ROTHE-BARNESON, AMAZON MINING COMPANY, a Montana partnership, PAUL ANTONIOLI, STEPHEN ANTONIOLI, and JAMES E. HOSKINS,

Plaintiffs,

v.

THE STATE OF MONTANA,

Defendant.

Currently before this Court is the State of Montana's partial motion to dismiss or, alternatively, for summary judgment filed August 18, 2000.

BACKGROUND

Plaintiffs are the holders of mineral leases, surface leases, fee surface, and fee mineral interests located east of Lincoln, Montana, in Lewis and Clark County. Plaintiffs are currently in the process of developing gold and silver mining operations associated with their property interests near Lincoln. The instant dispute is, for the most part, centered on six metalliferous mineral or gem mining leases in the McDonald Mine Project area (McDonald Project) issued by the State of Montana which authorize Plaintiffs' to mine gold, silver and other associated minerals. The underlying mineral estates which are the subject of these leases are held by the State as part of its School Trust holdings.

Plaintiffs commenced discussions with the Montana Department of State Lands (DSL) in 1992 regarding the acquisition of a permit pursuant to the Montana Metal Mine Reclamation Act (MMRA) to begin mining and mineral processing on the McDonald Project. On November 1, 1993, Plaintiffs entered into a Memorandum of Agreement with the DSL to address administrative issues arising out of the Environmental Impact Statement (EIS) required by the Montana and National Environmental Policy Acts. Approximately a year later, due to growing uncertainty whether sufficient time remained on the leases to complete the permitting process, Plaintiffs and DSL entered into an agreement extending the primary term of the six McDonald Project leases.

In November 1994, Plaintiffs submitted an application for an operating permit to DSL for review under the MMRA. Plaintiffs proposed to construct and operate the McDonald Project as a surface mine combined with cyanide leaching for gold and silver. On March 22, 1996, the Department of Environmental Quality (DEQ) determined that Plaintiffs' application was complete for purposes of the MMRA.[1] Plaintiffs subsequently agreed to extend the deadlines for entry of a record of decision on its application for an operating permit, as set forth in § 82-4-337, MCA, until January 2000. As the environmental review process unfolded, Plaintiffs executed a series of change of scope and contract modifications regarding the production of the EIS. On July 2, 1998, DEQ issued a stop work order on the McDonald Project EIS due to Plaintiffs' non payment of fees related to third-party EIS services. The Montana Department of Natural Resources and Conservation (DNRC) informed Plaintiffs in September 1998 that, as a result of the DEQ's stop work order, the primary terms of the McDonald Project leases had commenced to run. DNRC has since notified Plaintiffs that the McDonald Project leases have terminated. Plaintiffs' administrative appeal of DNRC's lease termination was denied by summary judgment.

---

[1] In the meantime, as part of an executive agency reorganization, the Montana Department of Environmental Quality assumed DSL's responsibilities under the MMRA.

In the November 1998 general election, Montana voters passed Initiative 137 (I-137), which specifically prohibited "open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore-processing reagents." Subsequently codified at Section 82-4-390, MCA (1999), I-137 exempted mines in operation prior to November 3, 1998. Section 82-4-390(2), MCA. Plaintiffs had not acquired the necessary operating permits prior to the enactment of I-137. In late 1998, the State informed Plaintiffs that it was unable to process an application contemplating the cyanide processing of gold and silver ore. Plaintiffs claim that they are not able to submit a new or amended permit application complying with I-137 because there are no alternatives besides cyanide leaching which will allow economically viable production of gold and silver from the McDonald Project. The suspension of the permitting process caused the primary terms of Plaintiffs' leases to expire. Plaintiffs expended substantial sums of money during the processing of its operating permit application.

On April 11, 2000, Plaintiffs filed a complaint in the United States District Court for the District of Montana alleging that I-137 violated their constitutional rights and seeking declaratory and injunctive relief concerning the unconstitutionality and unenforceability of I-137, as well as compensation for the takings I-137 allegedly wrought. The Federal District Court has subsequently dismissed with prejudice Plaintiffs' substantive due process claim as "simply a takings claim by another name," dismissed without

prejudice Plaintiffs' takings claims as unripe due to pending proceedings in this Court, and stayed proceedings on their federal-law based claims.

On the same day that Plaintiffs filed their federal complaint, they also filed a complaint in this Court. Plaintiffs' initial complaint alleges 12 separate counts: Count One claims that the text of I-137 failed to meet statutory requirements governing the presentation of initiatives. Count Two claims that I-137 violates Plaintiffs' substantive due process rights. Count Three claims that I-137 violates Plaintiffs' equal protection rights. Count Four claims that I-137 unconstitutionally impairs their contract with the State. Count Five claims that I-137 is invalid because it exceeds the inherent limits of the State's police powers. Counts Six through Eight claim that if I-137 is held to be valid and enforceable, it has effected a permanent taking for which Plaintiffs are entitled to just compensation. Counts Nine and Ten claim that if I-137 is held to be invalid or unenforceable, it has effected a temporary taking for which just compensation is due. Count Eleven claims that the State breached its contractual assurance that Plaintiffs would receive a decision on its permit application and that the State would not change the decisional statutes prior to reaching such a decision. Lastly, Count Twelve claims that the State breached its covenant of good faith and fair dealing. In an Amended Complaint, Plaintiffs added Counts Thirteen and Fourteen. Count Thirteen seeks judicial review of the DNRC's administrative decision affirming the

termination of the primary term of Plaintiffs' mineral leases. Count Fourteen seeks a declaration that this administrative decision constituted a breach of the State's contractual obligations to Plaintiffs and seeks specific performance of these obligations.

The State has filed a motion to dismiss or in the alternative for summary judgement with regard to all counts with the exception of Count Eight and the newly added Counts Thirteen and Fourteen. It is to that motion that the following discussion is directed.

STANDARD OF REVIEW

The parties contest the appropriate standard this Court should use in reviewing the State's motion. The State argues that, with regard to Count One, Counts Four through Seven, and Counts Nine through Twelve, the standards governing the determination of a motion to dismiss are appropriate because it is relying only on the complaint and documents whose contents are alleged in the complaint and whose authenticity no party questions. With regard to Counts Two and Three, the Plaintiffs' equal protection and due process claims, the State relies on material extraneous to the complaint and contends that therefore summary judgment standards should apply.

Plaintiffs argue that the State's entire motion must be adjudicated under the standards governing motions to dismiss. Plaintiffs maintain that the State has not presented a justiciable motion for summary

judgment because it has failed to carry its initial burden of demonstrating with appropriate evidence that no genuine issues of material fact exist. At this point, Plaintiffs' argument about whether or not the State has carried its burden of proof with regard to its motion for summary judgment on Counts Two and Three is premature. This is not an argument about the applicable standard of review, but rather an argument about the merits of the State's motion – whether the State has carried its summary judgment burden.

The State's motion with regard to Counts Two and Three will be reviewed pursuant to summary judgment standards to determine whether the State has proven that there are no issues of genuine fact and whether it is entitled to judgment as a matter of law. *See* Rule 56, M.R.Civ.P.; *Lewis v. Puget Sound & Light Co.,* 306 Mont. 37, 40, 29 P.3d 1028, 1031 (2001). The State's motion with regard to Count One, Counts Four through Seven, and Counts Nine through Twelve will be reviewed pursuant to the standards governing motions to dismiss. That is, the State's motion will be construed in a light most favorable to the Plaintiffs and will not be granted unless it appears beyond a doubt that the Plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *See, e.g., Hilands Golf Club v. Ashmore,* 277 Mont. 324, 328, 922 P.2d 469, 471-72 (1996). In considering this motion, all allegations of fact contained in Plaintiffs' complaint will be taken as true. *Id.*

DISCUSSION

I. Summary Judgment: Counts Two and Three

In Counts Two and Three, Plaintiffs claim that I-137 has deprived them of their property rights in violation of their right to substantive due process and has deprived them of their right to equal protection of the laws as guaranteed by the Montana Constitution. Plaintiffs' allegations supporting each claim are essentially the same. Plaintiffs contend that I-137 is unnecessary because compliance with existing constitutional and statutory requirements governing surface mining and cyanide leaching would have been sufficient to prevent any unacceptable impacts to Montana's environment associated with these activities. Plaintiffs also claim that I-137 is arbitrary in that it does not completely prohibit open-pit mining nor does it completely prohibit cyanide leaching, but rather only prohibits the cyanide leaching of gold and silver ore that has been extracted from an open-pit mine, and then only from those mines that were not operating under an existing permit as of November 3, 1998. They insist that I-137 was specifically intended to prevent the permitting of the McDonald Project. Plaintiffs also maintain that I-137 operates retrospectively in that it imposed new liabilities with regard to transactions or considerations already undertaken.

A. Count Three Equal Protection

The first step in an equal protection analysis is to identify the classes involved and determine whether

they are similarly situated. *See, e.g., Henry v. State Comp. Ins. Fund,* 294 Mont. 449, 455, 982 P.2d 456, 461 (1999). The next step is to determine the appropriate level of scrutiny. If a suspect classification or fundamental right is involved, the legislation is strictly scrutinized. *E.g., Matter of S.L.M.,* 287 Mont. 23, 33, 951 P.2d 1365, 1371 (1997). If the right in question has its origins in the Montana Constitution, but is not found in the Declaration of Rights, middle-tier scrutiny applies. *Butte Cmty. Union v. Lewis,* 219 Mont. 426, 712 P.2d 1309 (1986). Lastly, if neither of the above two situations is present, the legislation is evaluated using the rational basis test. *Henry,* 294 Mont. at 456, 982 P.2d 461.

Plaintiffs contend that I-137 creates four similarly situated classes: (1) proposed open-pit gold and silver mines like the McDonald Project that use cyanide leaching; (2) existing open-pit gold and silver mines that use cyanide leaching; (3) underground gold and silver mines that use cyanide leaching; and (4) mining operations that use cyanide leaching but do not mine gold or silver. Plaintiffs assert that all classes are similarly situated in that they each use or propose to use cyanide leaching, but that only the first class, proposed open-pit gold and silver mines, is arbitrarily singled out for adverse treatment. The State does not dispute the Plaintiffs' characterization of the classes created by I-137.

With regard to the appropriate level of scrutiny, Plaintiffs make no reasonable argument that the actual classifications created by I-137 are suspect,

infringe on a fundamental right, or infringe on some other constitutional right not contained in Montana's Declaration of Rights.[2] Companies who open-pit mine for gold and silver and choose to use cyanide leaching simply are not a suspect class, nor can mining in such a manner be considered a fundamental right. Accordingly, I-137 must only pass rational basis scrutiny. Rational basis scrutiny requires this Court to determine: (1) whether the legislation in question is related to a legitimate governmental concern; and (2) whether the means chosen by the legislature to accomplish its objective are reasonably related to the result sought to be attained. *Henry,* 294 Mont. at 457, 982 P.2d at 462.

In determining whether the legislation in question is related to a legitimate governmental concern, the Montana Supreme Court has stated: "The purpose of the legislation does not have to appear on the face of the legislation or in the legislative history, but may be *any possible purpose of which the court can*

---

[2] Plaintiffs allege that because of the circumstances surrounding the enactment of I-137, namely the general limitations on corporate political contributions found unconstitutional in *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000), the appropriate level of scrutiny should be strict. We do not see how contribution limitations applicable to all corporations, including all mining corporations, during the election cycle in which I-137 was passed could possibly establish that the classifications created by I-137 are suspect or infringe on a fundamental right. The level of scrutiny will be determined with reference to the classes created or rights allegedly infringed by the challenged legislation.

conceive." Stratemeyer v. Lincoln County, 259 Mont. 147, 152, 855 P.2d 506, 510 (1993) (reviewing equal protection challenge pursuant to rational basis test) (emphasis added).

The State contends that the purpose of I-137 is to prevent or reduce the release of cyanide into the natural environment, noting that "no dispute exists that cyanide heap leaching . . . has the potential to cause severe environmental degradation." Both parties agree that the State may legitimately legislate to control the adverse effects of environmental pollutants. *See* Pls.' Reply Br., at 8. However, Plaintiffs maintain that the State has "not bothered to describe in any detail what the legitimate legislative purpose of I-137 was or the factual basis for it." There is no serious doubt that the release of cyanide into the environment may result in adverse environmental consequences, not even Plaintiffs contest this. The purpose of I-137 needs no further factual development – not only would I-137 be devoid of any significant legislative history given that it was enacted as an initiative, but, more importantly, the purpose of I-137 can be any possible legitimate purpose of which this Court can conceive. Rational basis scrutiny requires nothing more. *See, e.g., Stratemeyer,* 259 Mont. at 152, 855 P.2d at 510. This Court is satisfied with the State's proffered purpose.

As a result, summary judgment is proper with regard to Plaintiffs' equal protection claim if the prohibition on new open-pit gold and silver mines that use cyanide leaching is reasonably related to the

purpose of controlling the adverse environmental effects of cyanide. Plaintiffs contend that the classification chosen, new open-pit gold and silver mines that use cyanide leaching, is arbitrary. Plaintiffs note that although new mines are prohibited, existing open-pit gold and silver mines that use cyanide leaching are expressly excluded from the prohibition, as well as underground gold and silver mines that use cyanide leaching, and those mining operations which do not mine for gold and silver but do use cyanide leaching. Plaintiffs contend these classes are all similarly situated in that they all use cyanide leaching, but that the State has arbitrarily chosen to single out one class, proposed open-pit gold and silver mines, for adverse treatment. Plaintiffs argue that the State has failed to provide any empirical evidence supporting these classifications.

Plaintiffs appear to be unaware of the great deference accorded legislative decision-making under the rational basis test. As the United States Supreme Court has stated with regard to the federal counterpoint to Montana's guarantee of equal protection:

> [R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Nor does it authorize the judiciary to sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. For these reasons, a classification neither involving fundamental rights

nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. *Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.*

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require,

> rough accommodations – illogical, it may be, and unscientific.

Heller v. Doe, 509 U.S. 312, 319-21, 113 S. Ct. 2637, 2642-43, 125 L.Ed.2d 257 (1993) (citations and quotations omitted) (emphasis added).

The Court will address each classification separately. First, in distinguishing between gold and silver mines and other types of mines that use cyanide leaching, the State argues that the determination to focus on gold and silver mining is unremarkable given that it has been recognized as the mining sector where cyanide leaching is quite extensive and where, not unexpectedly, the environmental impact of cyanide use is pronounced. In support of this argument, the State has submitted two documents produced by the Federal Environmental Protection Agency (EPA). Plaintiffs have not contested the relevance or authenticity of either document. Accordingly, this Court takes judicial notice of both. *See* Rule 201(b), M.R.Evid, The "Profile of the Metal Mining Industry," published in September 1995 as part of EPA's Sector Notebook Project, identifies cyanide leaching as the primary technique used to process gold and silver ore. Office of Compliance, Environmental Protection Agency, *Profile of the Metal Mining Industry*, 25 and 28 (Sept. 1995) ("cyanide is . . . consumed in massive quantities by the gold industry"). Cyanide leaching is not identified as the primary method or even one of the principal methods used in the processing of any other metal ore. See *Profile*, at 20-25 (discussing beneficiation

processes used for iron, copper, lead, zinc, gold and silver ores). The State has articulated a reasonably conceivable set of facts supporting I-137's distinction between gold and silver mining and other types of mining for purposes of eliminating or reducing the potential of cyanide pollution. Plaintiffs have not offered any evidence undermining these facts.

Second, in distinguishing between open-pit and underground mines that use cyanide leaching, the State suggests that the legislature could have reasonably concluded that significant commercial underground gold and silver mining would not be undertaken in Montana in the foreseeable future and therefore no need existed to proscribe such activity in the future. Citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S. Ct. 715, 66 L.Ed.2d 659 (1981), the State observes that it is not required to "strike at all evils at the same time or in the same way" but may implement its program step by step "adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." 449 U.S. at 466 (upholding Minnesota law which banned plastic milk containers but did not ban non-plastic nonreturnable containers). This Court also notes that in the "*Profile of the Metal Mining Industry*" the EPA observes that open-pit mining is the primary domestic source of gold and silver, the metal ores typically associated with cyanide leaching. *Profile*, at 17, 25. Thus, there are facts supporting I-137's distinction between open-pit mines which use cyanide leaching and

underground mines using the same process. Plaintiffs have not countered with any evidence which belies the rational basis for this distinction.

Lastly, in distinguishing between proposed and existing open-pit mining using cyanide leaching, the State argues that the legislature could have reasonably determined that the economic disruption caused by shutting down operating open-pit gold and silver mines which employ cyanide leaching warranted allowing those facilities to continue production. Once again, this is a reasonably conceivable state of facts which supports I-137's distinction between new and existing open-pit mines. Plaintiffs have not forwarded any evidence discounting the rationality this distinction.

Plaintiffs have failed to carry their burden of proving the existence of genuine issues of material fact regarding the rationality of the classifications contained in I-137. The State is entitled to summary judgment with respect to Count Three which is hereby dismissed with prejudice.

B. Count Two: Substantive Due Process

As the State observes, the substantive due process analysis is, for present intents and purposes, the same as the equal protection analysis. Both analyses require this Court to determine: (1) whether the legislation in question is related to a legitimate governmental concern; and (2) whether the means chosen by the legislature to accomplish its objective

are reasonably related to the result sought to be attained. *Compare Plumb v. Fourth Jud. Dist. Ct.*, 279 Mont. 363, 372, 927 P.2d 1011, 1016 (1996) (substantive due process); *with Henry,* 294 Mont. at 457 (equal protection).

The legitimate public purpose of I-137 is, as discussed above, to prevent or reduce the adverse effects of cyanide on Montana's natural environment. Plaintiffs contend that the prohibition against new open-pit gold and silver mines using cyanide leaching is not reasonably related to the purpose of I-137 because compliance with existing constitutional and statutory requirements governing surface mining and cyanide leaching would have been sufficient to prevent any unacceptable impacts to Montana's environment associated with these activities. This claim is not worthy of further examination. As the State correctly observes, it would be entirely reasonable for the citizens of Montana and the legislature to conclude that, although existing laws might reduce the possibility of environmental harm from the release of cyanide, the most effective method of further reducing or eliminating that possibility is to prohibit the chemical's use.

Plaintiffs also argue that they have a vested constitutionally protected property right in the state mineral leases which they own and that I-137 has a retroactive effect in that it prohibits the development of these leases. Plaintiffs assert that they have worked with the State during the permitting process, spending millions of dollars and entering multiple

contractual relationships to advance this process. The State responds that I-137 operates in a wholly prospective fashion, only prohibiting those open-pit gold and silver mines using cyanide leaching processes which were not permitted at the time of its enactment. Section 82-4-390(2), MCA.

An impermissibly retroactive law is one which "takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already passed." *Wallace v. Mont. Dept. of Fish, Wildlife & Parks*, 269 Mont. 364, 367-68, 889 P.2d 817, 819-20 (1995)). In *Wallace,* the Montana Supreme Court held that a license is a privilege to which the applicant is not entitled until such time as the licensing authority acts on the application. *Wallace*, 269 Mont. at 368, 889 P.2d at 828. The *Wallace* Court affirmed the denial of the Wallaces' application for an expansion of their game farm, when the denial was based on a change in the permitting law which occurred after the Wallaces submitted their application.

As in *Wallace,* Plaintiffs did not acquire a vested right to open-pit mine gold and silver using cyanide leaching merely because they had submitted an application seeking an operating permit to do so. Whether I-137 actually impaired Plaintiffs' rights is more appropriately considered pursuant to Plaintiffs' takings and contract-based claims discussed below. Summary judgment in favor of the State with regard

to Plaintiffs' substantive due process claim is warranted. Count Two is hereby dismissed with prejudice.

II. Motion to Dismiss: Counts One, Four through Seven, Nine through Twelve

A. Count One: Initiative Requirements

In Count One, Plaintiffs claim that the text of I-137 was not presented to the electorate in the bill form provided in the most recent issue of the bill drafting manual as required by Section 13-27-201, MCA. Plaintiffs note that the drafters correctly presented the bill to Legislative Services, who informed them that it lacked a codification instruction, but that the drafters opted not to conform the text to Legislative Services' recommendations. The State moves to dismiss, arguing that this issue has been mooted by the subsequent legislative codification of I-137. On the merits, the State argues: (1) the laws governing the presentation of ballot issues encourage liberal allowance of citizen initiated legislation, requiring only "substantial" compliance; (2) pursuant to Section 13-27-202(1), MCA, the recommendations of Legislative Services do not have to be accepted; and (3) statutes have been enforced with patently incorrect codification instructions. Plaintiffs respond that the State's motion to dismiss is premature because the bill drafting manual and the correspondence between the drafters and Legislative Services are not before the Court.

The essence of Plaintiffs' claim is that I-137 is invalid because it lacked a proper instruction concerning where it was to be codified. Even if this allegation is true, Plaintiffs will be unable to invalidate I-137 on this basis. As the State notes, a petition for an initiative must be "substantially" in the form provided by the Montana Code Annotated and that "[c]lerical and technical errors that do not interfere with the ability to judge the sufficiency of signatures on the petition do not render a petition void." Section 13-27-201, MCA. The lack of a codification instruction does not relate to the substance of I-137. Under the circumstances, a merely faulty or completely missing codification instruction certainly cannot be relied upon to invalidate the will of the electorate in passing I-137. The State's motion to dismiss Count One is granted.

B. Counts Four, Eleven, and Twelve: Contract-Based Claims.

In Count Four, Plaintiffs allege that I-137 unconstitutionally impairs contractual obligations in violation of the Montana and Federal Constitutions. The contract clauses of the Montana and United States Constitutions have generally been interpreted as "interchangeable guarantees against legislation impairing the obligation of contract." *Carmichael v. Workers' Comp. Ct.*, 234 Mont. 410, 414, 763 P.2d 1122, 1125 (1988). This Court employs a three-part test when analyzing a contract clause challenge: Is the state law a substantial impairment to the

contractual relationship? If so, does the State have a significant and legitimate purpose for the law? And lastly, does the law impose reasonable conditions which are reasonably related to achieving the legitimate and public purpose? *Id.*

In resolving the State's motion to dismiss Count Four, the first issue is whether beyond a doubt there are no set of facts under which Plaintiffs could prove that I-137 substantially impairs their contractual relationship with the State. The State argues that pursuant to the express terms of its leases with the State, Plaintiffs agreed to abide by subsequent environmental regulations. Thus, the State maintains, Plaintiffs' contract only granted them the right to mine for gold and silver in accordance with all applicable regulations in effect at the time of mining, which would include regulations prohibiting surface mining with cyanide leaching. Plaintiffs concede that they agreed to abide by environmental regulations in effect at the time they carried out mining activities and to any and all laws governing the manner in which such operations were to be conducted. However, Plaintiffs argue that I-137 completely abrogated the leases by prohibiting them from conducting the very activity which both parties recognized to be the only reason for entering the leases.

Basically, Plaintiffs appear to be contending that, while they did agree to abide by subsequent regulations, they did not agree to abide by subsequently enacted legislation which completely prohibited the

sole activity contemplated by their agreement, Turning our attention to the leases, the leases provide that, in consideration for annual rent payments, the State leases the land to the Plaintiffs for the purpose of mining gold, silver and other associated minerals. Paragraph 7 of the Plaintiffs' leases with the State provides: "The lessee shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation." Plaintiffs concede that pursuant to this provision they agreed to abide by environmental regulations in effect at the time they carried out mining activities.

A law which restricts a party to gains reasonably expected from a contract is not a substantial impairment. *Carmichael,* 234 Mont. at 414, 763 P.2d at 1125. Where the language of an agreement is clear and unambiguous and, as a result, susceptible to only one interpretation, the duty of the court is to apply the language as written. *Carelli v. Hall*, 279 Mont. 202, 209, 926 P.2d 756, 761 (1996). Whether or not an ambiguity exists is a question of law for the court to decide. *Id.* Only where an ambiguity exists may the court turn to extrinsic evidence of contemporaneous or prior oral agreements to determine the intent of the parties. *Id.* If the terms of the contract are clear, however, "there is nothing for the courts to interpret or construe" and the court must determine the intent of the parties from the wording of the contract alone. *Wray v. State Comp. Ins. Fund*, 266 Mont. 219, 223, 879 P.2d 725, 727 (1994).

As is clear from the language of the leases, the parties intended that Plaintiffs would have the right to mine for gold and silver during the lease term subject to "*all* applicable state and federal laws, rules and regulations, *including but not limited to those concerning . . . environmental protection.*" (Emphasis added.) I-137 is a state regulation concerning mining and environmental protection. Plaintiffs concede that the leases subjected them to subsequently enacted mining regulations. Furthermore, the leases do not grant Plaintiffs the right to mine using any one particular method. From the foregoing, this Court can only conclude that, at least at the time Plaintiffs accepted the leases, Plaintiffs should have reasonably expected that they would be subject to any future mining or environmental regulations, including regulations prohibiting surface mining of gold and silver combined with cyanide leaching of the ores.

The agreement expressed by these written leases could only be subsequently altered by "a contract in writing or by an executed oral agreement, and not otherwise." Section 28-2-1602, MCA. On August 26, 1994, the leases were amended pursuant to a written agreement entitled "Mineral Lease Amendment Agreement" (Amendment Agreement). Plaintiffs contend that documents prepared by the DNRC in conjunction with the execution of this Amendment Agreement explicitly state that the object of the leases was the surface mining of gold and silver with cyanide leaching. Paragraph 6 of the Amendment Agreement provides "as expressly amended hereby,

the Mineral Leases shall remain in full force and effect according to their terms." After a quick perusal of the Amendment Agreement, this Court is unaware of any express agreements therein which excuse Plaintiffs from subsequently enacted mining or environmental regulations or guarantee the permitting of any particular mining operation. It is unlikely Plaintiffs will be able to prove that their contractual rights were substantially impaired; they apparently agreed to accept the risk of future regulatory changes. However, without further briefing regarding the intent and effect of the parties' various subsequent agreements, this Court is hesitant to dismiss Plaintiffs' claim at this stage. Accordingly, the State's motion to dismiss Count Four is denied. For similar reasons, the State's motion to dismiss Counts Eleven and Twelve, in which Plaintiffs maintain a breach of contract claim and a breach of an implied covenant claim, is also denied.

C. Count Five: Police Power

In Count Five, Plaintiffs allege that I-137 is in violation of the "inherent limits" on Montana's legislative police power. In response to the State's motion to dismiss, Plaintiffs contend that I-137 is illegitimate because "there is an inadequate relationship between the statute in question and what otherwise maybe a valid objective of the statute." In support of this contention, Plaintiffs make their equal protection argument that I-137 arbitrarily treats members of the class "users of the cyanide leaching process"

differently. Plaintiffs concede that their claim is not based on the "public use" criteria of Article II, section 29 of the Montana Constitution. The State moves to dismiss noting that this claim is essentially another stab at Plaintiffs' equal protection and substantive due process claims.

Plaintiff's "police powers" claim adds nothing to their complaint; it is simply a restatement of their other constitutional claims. The State's motion to dismiss with respect to Count Five is granted.

D. Counts Six, Seven, Nine, and Ten: Takings Claims

Counts Six through Ten are all takings claims of one sort or another. Counts Six through Eight are "permanent takings" claims.[3] In these claims, Plaintiffs allege that in the event this Court determines that I-137 is valid and enforceable, it has taken from Plaintiffs their ability to produce and sell gold and silver from the lands comprising the McDonald Project, Keep Cool Project, and Seven-Up Project. Conversely, Counts Nine and Ten are "temporary takings" claims. In these claims, Plaintiffs allege that in the event this Court determines that I-137 is

---

[3] Count Six is on behalf of the Seven-Up Pete Venture; Count Seven is on behalf of Canyon Resources, the owner of Seven-Up Pete Venture; Count Eight is on behalf of the other named Plaintiffs in association with their interests in the Seven-Up Pete Project. The State has not moved to dismiss Count Eight.

invalid, the State temporarily took their ability to produce and sell gold from the McDonald Project during the time that the State enforced I-137.

Article II, section 29 of the Montana Constitution provides that private property shall not be taken for public use without just compensation. The scope of Montana's constitutional takings protections has been determined with reference to decisions interpreting federal takings protections. *See Rudloff v. City of Billings,* 260 Mont. 371, 860 P.2d 140. This provision protects private property owners from absolute conversion, by way of condemnation, as well as uncompensated takings of property by way of regulation. *See Pa. Coal Co. v. Mahon,* (1922), 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed.2d 322. With regard to regulatory takings, courts have had little success in devising any set formula for determining when governmental regulation of private property amounts to a taking. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency,* 216 F.3d 764, 771-72 (9th Cir. 2000). The United States Supreme Court has identified two specific circumstances in which a government regulation is categorically a taking: (1) regulations that compel a property owner to suffer a permanent physical "invasion" or "occupation" of his or her property, *see, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 3171, 73 L.Ed.2d 868 (1982); and (2) regulations that deny "all economically beneficial or productive use of land," *see Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893,

120 L.Ed.2d 798 (1992). *See generally Tahoe-Sierra,* 216 F.3d at 772-73. In the absence of a categorical taking, the Supreme Court has repeatedly recognized that "whether a particular restriction [amounts to a taking] depends largely upon the particular circumstances [of each] case." *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978) (quotation omitted). In this regard the Supreme Court and lower courts have indicated that most regulatory takings cases should be resolved by balancing the public and private interests at stake, with three primary factors weighing in the balance: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Tahoe-Sierra,* 216 F.3d at 771-72 (citing *Penn Central,* 438 U.S. at 124,98 S.Ct. at 2659).

Essentially, the State's argument with respect to these counts is the same as its argument with respect to Plaintiffs' unconstitutional impairment of contract claim. The State contends that, to the extent the Plaintiffs' takings claims arise out of their leases with the State, they should be dismissed because those leases do not grant a property right to develop the mineral estate in any specific manner. Rather, the right to develop the mineral estate as described by the leases was conditioned in a number of ways, including requiring the lease-holder to comply with all environmental laws and to secure approval of

DEQ prior to any surface disturbing activity. Thus, because the leases did not grant Plaintiffs a property right to develop the mineral estate as an open-pit mine using cyanide leaching, I-137 could not have taken a property right.

As the State correctly maintains, even if Plaintiffs contend that the regulation deprived them of all economically beneficial use, the logical antecedent inquiry is whether the proscribed use was part of Plaintiffs' title to begin with. *See Lucas,* 505 U.S. at 1027. Plaintiffs' title is described by the leases themselves and any written modification agreements or executed oral agreements. *See* Section 28-2-1602, MCA. As described more fully above, the lease agreements themselves do not provide for surface mining with cyanide leaching, but rather only grant the right to mine for gold and silver subject to applicable regulations and the acquisition of the necessary permits. The Amendment Agreement does not appear to excuse Plaintiffs from subsequent regulations nor to guarantee the permitting of any particular mining operation. However, without further briefing regarding the intent and effect of the various agreements entered subsequent to the lease agreements, this Court is hesitant to dismiss these claims at this stage. Accordingly, the State's motion to dismiss Counts Six, Seven, Nine, and Ten is denied.

CONCLUSION

IT IS HEREBY ORDERED that the State's motion is GRANTED in part and DENIED in part. The State's motion is GRANTED with respect to Counts One, Two, Three, and Five. These counts are hereby dismissed with prejudice. The State's motion is DENIED with respect to Counts Four, Six, Seven, Nine, Ten, Eleven, and Twelve. Also, the Court notes that Counts Eight, Thirteen, and Fourteen were not subject to the State's motion and thus still stand.

DATED this 1 day of November, 2001.

/s/ JEFFREY M. SHERLOCK
District Court Judge

pc. Alan L Josecelyn
Randy L. Parcel
Mike McGrath/Candace F. West
G. Martin Tuttle
Tommy H. Butler
Karl J. Englund

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

SEVEN-UP PETE VENTURE, an Arizona partnership, d/b/a SEVEN-UP PETE JOINT VENTURE; CANYON RESOURCES CORPORATION, a Delaware Corporation; JEAN MUIR; DR. IRENE HUNTER; DAVID MUIR; ALICE CANFIELD; TONY PALAORO; JUNE E. ROTHE-BARNESON; AMAZON MINING COMPANY, a Montana Partnership; PAUL ANTONIOLI; STEPHEN ANTONIOLI; and JAMES E. HOSKINS,

Plaintiffs,

vs.

MARC RACICOT, Governor of the State of Montana, and MARK SIMONICH, Director of the Montana Department of Environmental Quality,

Defendants.

CV 00-13-H-CCL

ORDER

(Filed Sept. 4, 2001)

* * *

Before the court are Plaintiffs' motion to stay all proceedings in this case pending final resolution of a

related state-court case and Defendants' cross-motion to dismiss.

BACKGROUND

On November 3, 1998, the voters of the State of Montana Passed Initiative 137 ("I-137"), which banned the use of cyanide to process gold and silver ores extracted from open pit mining operations.[1] Plaintiffs, through fee ownership and/or mineral leases, own the rights to produce and sell minerals on various tracts of land situated east of Lincoln, Montana. Prior to the enactment of I-137, however, Plaintiffs had not secured permits from the State of Montana's Department of Environmental Quality ("DEQ"), which would entitle them to commence mining operations on these holdings in compliance with Montana law. In large part, this situation was due to the fact that Plaintiffs had been negotiating with DEQ for several years prior to the enactment of I-137 concerning the completion of an Environmental Impact Statement that was a prerequisite for obtaining the mining permits Plaintiffs sought. During the course of this process, Plaintiffs expended substantial sums of money anticipating that they would ultimately receive their permits and would be able to mine on their holdings.

---

[1] I-137, subsequently codified at M.C.A. § 82-4-390, excepted from this prohibition those mines that were operating pursuant to a continuing use permit prior to the initiative's enactment.

After the passage of I-137, Plaintiffs were informed by the State of Montana that their application could not be processed in its then-present form because Plaintiffs' proposed mining operations contemplated the use of cyanide to process extracted ores – an approach specifically precluded by I-137. Plaintiffs contend that there is no economically viable way to extract ore from their holdings but by the use of cyanide, and that they are thus unable to alter their permit application. This situation led to the suspension of the permitting process, which caused the primary terms of Plaintiffs' mineral leases to begin to run.

On April 11, 2000, Plaintiffs filed the instant action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201, alleging that I-137 violated their constitutional rights and seeking declaratory and injunctive relief concerning the unconstitutionality and unenforceability of I-137, as well as compensation for the takings I-137 allegedly wrought. In its particulars, Plaintiffs' complaint alleges nine counts. Count I claims that I-137 violates Plaintiffs' substantive due process rights. Count II claims that I-137 denies to Plaintiffs equal protection of the law as guaranteed by the 14th Amendment to the United States Constitution. Count III claims that I-137 unlawfully impairs the obligation of contracts between Plaintiffs and the State of Montana, in violation of Art. I, § 10 of the United States Constitution. Count IV claims that I-137 is invalid because it exceeds the inherent limits of the State of Montana's police powers. Counts V-VII

claim that, if I-137 is held to be valid and enforceable, its implementation and enforcement by Defendants effect permanent takings for which Plaintiffs are entitled to just compensation. Counts VIII and IX claim that, if I-137 is held to be invalid and unenforceable, its implementation and enforcement by Defendants during the period between I-137's enactment and the declaration of unenforceability effected temporary takings for which Plaintiffs are entitled to just compensation.

Immediately after filing this complaint, Plaintiffs filed the pending motion to stay the case under the abstention doctrine established in *Railroad Comm'n. v. Pullman Co.*, 312 U.S. 496 (1941). Hours later, Plaintiffs filed a companion suit in state court. In ¶ 9 of the state court suit,[2] Plaintiffs informed the state court of the existence of their federal claims, and expressed their intention to reserve consideration of those claims by the federal court under the doctrine of *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964).

Defendants oppose Plaintiffs' efforts to move this case forward under a *Pullman/England* approach. Defendants' motion to dismiss argues that Counts V-IX of Plaintiffs' federal complaint are not yet ripe for adjudication. Therefore, Defendants contend, this

---

[2] Plaintiffs submitted a copy of that complaint as Exhibit 1 to the Brief in Support of the Motion for Stay, filed April 18, 2000.

court lacks subject matter jurisdiction over those claims and those claims must be dismissed.[3] Furthermore, Defendants argue that this court should decline jurisdiction over the remainder of Plaintiffs' claims under the abstention doctrine first promulgated in *Younger v. Harris, supra,* note 3.[4] The Court has carefully reviewed the motions and is prepared to rule.

---

[3] Defendants' motion to dismiss originally alleged only that counts V-VII were not yet ripe, and included counts VIII and IX among the counts that ought to be dismissed pursuant to the abstention doctrine first promulgated in *Younger v. Harris,* 401 U.S. 37 (1971). In their reply brief in support of their motion to dismiss, however, Defendants extend their ripeness argument to include Counts VIII and IX as well, though they also persist in the contention that counts VIII and IX are in any event subject to dismissal under *Younger.* Defendants' Reply Brief at 4 and 10 n.2.

Issues raised for the first time in reply briefs are generally deemed waived. *See, e.g., Dilley v. Gunn,* 64 F.3d 1365, 1367 (9th Cir. 1995). But since the court finds, for reasons elucidated below, that it lacks subject matter jurisdiction over claims VIII and IX, a waiver argument would be unavailing. *See, e.g., United States v. Hays,* 515 U.S. 737, 742, (1995); *De Saracho v. Custom Food Mach., Inc.,* 206 F.3d 874, 878 (9th Cir. 2000) ("Subject matter jurisdiction cannot be waived and may be raised at any time").

[4] Defendants also argue that they are entitled to qualified immunity as to Counts I-IV. But because those Counts seek only declaratory and/or injunctive relief – rather than monetary damages – Defendants are mistaken. *See Presbyterian Church (U.S.A.) v. United States,* 870 F.2d 518, 527 (9th Cir. 1989) ("Qualified immunity is an affirmative defense to damage liability; it does not bar actions for declaratory or injunctive relief") (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 806 (1982)).

ANALYSIS

I. The Ripeness of the Takings Claims

"Whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction under the case or controversy clause of article III of the federal Constitution." *St. Clair v. City of Chico,* 880 F.2d 199, 201 (9th Cir. 1989). If a claim is unripe, a court lacks subject matter jurisdiction over it, and the claim must be dismissed. *See, e.g., Ecology Center, Inc. v. United States Forest Service,* 192 F.3d 922, 926 (9th Cir. 1999).[5]

The Ninth Circuit has articulated different standards for ripeness depending on whether a plaintiff's complaint alleges a facial or an as-applied takings claim. Different standards also apply depending on whether a facial takings claim alleges that a governmental action has deprived the property owner of the economically beneficial use of his property or whether that claim alleges that the statute or regulation being applied by the governmental entity is not rationally related to a legitimate state interest. In other words, there are three possible analytic categories into which a plaintiff's takings claims might fall: (1) facial/deprivation of economic benefit; (2) facial/no

---

[5] Such a dismissal should generally be without prejudice. *See, e.g., American Ass'n of Medical Colls. v. United States,* 217 F.3d 770, 785 (9th Cir. 2000).

rational relationship; (3) as applied.[6] Therefore, it is essential to ask what sort of takings claims Plaintiffs seek to bring in this case.

The language in which Plaintiffs couch their takings claims in Counts V-IX of their Complaint demonstrates that they are of the as-applied variety.[7] "In the event that I-137 is determined to be valid and enforceable, then Defendants' actions *in implementing and enforcing* I-137 have permanently taken from

---

[6] The Ninth Circuit has held that all as-applied claims are subject to the same standard for ripeness review, irrespective of the particular gravamen of the as-applied challenge. *Sinclair Oil Corp. v. County of Santa Barbara,* 96 F.3d 401, 405 (9th Cir. 1996). *See also, Williamson County Reg'l Planning Comm'n. v. Hamilton Bank,* 473 U.S. 172, 195 (1985).

[7] There is one sentence in Plaintiffs' complaint that suggests that they may be intending to propound a facial takings claim alleging that I-137 lacks any rational relationship to a legitimate state interest. Specifically, in Count I, Plaintiffs assert that "I-137 is arbitrary and capricious, and has no rational relationship to any legitimate public purpose[. . . .]" Complaint ¶ 85. However, that same sentence goes on to conclude chat " . . . Defendants' implementation and enforcement of [I-137] violates Plaintiffs' rights under the Fifth and Fourteenth Amendments of the United States Constitution." Moreover, the following paragraph, laying out the relief requested as to Count I, recites that "Plaintiffs are entitled to a declaration that I-137, *as implemented and enforced by Defendants,* deprives Plaintiffs and all others similarly situated of their property rights. . . . " Complaint ¶ 86 (emphasis added). Therefore, read in the context of both Count I and the Complaint as a whole, the Court is satisfied that the one-time invocation of the talismanic words "arbitrary and capricious" and "no rational relationship to any legitimate public purpose" is insufficient to demonstrate that Plaintiffs are in fact leveling any facial challenge at I-137.

the Venture, for public use, the ability to use its property. . . ." Complaint, ¶ 98. The permanent takings claims contained in Counts VI and VII are framed in virtually identical language. See Complaint ¶¶ 102 (Count VI) and 106 (Count VII). The temporary takings claims contained in Counts VIII and IX differ only to the extent that they are predicated on the finding that I-137 is unconstitutional. But they again locate the source of the harm allegedly suffered by Plaintiffs in Defendants' actions in implementing and enforcing I-137. See Complaint ¶¶ 110 (Count VIII) and 114 (Count IX).

The Ninth Circuit's standard for assessing the ripeness of an as-applied takings claim is clear.

> "In order to assert an as-applied takings claim, a plaintiff must establish two things: (1) the governmental entity has reached a final decision on the applicability of the regulation to the plaintiff's property; and (2) the plaintiff is unable to receive just compensation from the government."

San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095, 1102 (9th Cir. 1998) (citing *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 734 (1997); *Williamson County Reg'l Planning Comm'n,* 473 U.S. at 186). In this case, Plaintiffs cannot satisfy the second *San Remo* prong because they cannot presently demonstrate that they are unable to receive just compensation from the government.

Williamson County made clear that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." 473 U.S. at 194-95. The State of Montana clearly has an adequate process for obtaining compensation. *See, e.g., Riddock v. City of Helena,* 687 P.2d 1386, 1388 (Mont. 1992); *Smith v. N. Pac. R.R. Co.,* 186 P. 684, 686 (Mont. 1919); Montana Constitution Art. II, § 29. Indeed, Plaintiffs' parallel suit in state court represents their effort to avail themselves of that state process. Since that state court inverse condemnation action is not completed, Plaintiffs' as-applied takings claims are not ripe for review by this court. *See San Remo,* 145 F.3d at 1102; *Jones Intercable v. City of Chula Vista,* 80 F.3d 320, 324 (9th Cir. 1996). And since these claims are not ripe, this court lacks subject matter jurisdiction over them. They must therefore be dismissed.[8] As these claims may become ripe

---

[8] Plaintiffs argument that this ripeness threshold is a prudential rather than a jurisdictional requirement, see Plaintiffs' Response/Reply Brief at 16, is simply in error. *See, e.g., Sinclair Oil,* 96 F.3d at 405. Nor is Plaintiffs' reliance on *Dodd v. Hood River County,* 59 F.3d 852, 862 (9th Cir. 1995), to any more avail. It is true, as Plaintiffs' claim, that the *Dodd* court held that *Williamson County* did not require a federal Plaintiff to present his 5th Amendment takings claims to a state court prior to having them resolved in a federal forum. 59 F.3d at 860-61. But prior to going to federal court, the *Dodd* Plaintiff had already fully litigated a state court inverse condemnation action, seeking just compensation under *state* law. The *Dodd* court found that the pursuit of state law remedies was sufficient to

(Continued on following page)

in the future, this dismissal shall be without prejudice.

II. Substantive Due Process

Plaintiffs also cannot clear a preliminary hurdle placed in the path of the substantive due process claim they lodge in Count I of their complaint. "Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing [a Plaintiff's] claims.'" *Albright v. Oliver,* 510 U.S. 266, 273-74 (1994) (Rehnquist, C.J., for plurality) (quoting *Graham v. Connor,* 490 U.S. 386, 395 (1989)). *See also Armendariz v. Penman,* 75 F.3d 1311, 1319-30 (9th Cir. 1996) (en banc); *Patel v. Penman,* 103 F.3d 868, 874-75 (9th Cir. 1996); *Madison v. Graham,* 126 F.Supp.2d 1320, 1324 (D. Mont. 2001). In the matter at hand, as in the Ninth Circuit's *Armendariz* and *Patel* cases, it is clear that Plaintiffs' substantive due process claim is simply a takings claim by another name.[9] While such a claim may smell as sweet, the

---

satisfy the second prong of the *Williamson County* test. 59 F.3d at 860. Plaintiffs in this case have not yet fully litigated their state law claims, and thus are not on all fours with the *Dodd* Plaintiff.

[9] If Defendants' "implement[ation] and enforce[ment]" of I-137 "deprive[d] Plaintiffs . . . of their property rights[,]" Complaint ¶ 86, then a taking has been effected.

fact that "the Takings Clause 'provides an explicit textual source of constitutional protection' against the type of conduct challenged by [Plaintiffs]," means that "that clause preempts [their] substantive due process claim." *Patel v. Penman,* 103 F.3d at 875 (quoting *Graham v. Connor,* 490 U.S. at 395). Therefore, this claim must be dismissed as well. As this claim is entirely foreclosed by *Graham* and its progeny, this dismissal shall be with prejudice.

III. *Younger* Abstention

Plaintiffs seek to invoke the *Pullman* abstention doctrine to stay these proceedings while they litigate their state claims, and then to return to this court under the rule of *England* should the state case not dispose of the federal questions raised in this suit. Defendants, by contrast, argue that this court should simply decline to accept jurisdiction over Plaintiffs' claims and dismiss their complaint out of respect for the issues of comity, federalism and judicial economy that underlie the abstention doctrine laid out in *Younger v. Harris, supra.* "Abstention" is something of a misnomer in the *Younger* context, however, because when *Younger* applies, the federal action must be dismissed rather than – as under the *Pullman/ England* approach – held in abeyance until the conclusion of the state court suit. *See, e.g., Delta Dental Plan of California, Inc. v. Mendoza,* 139 F.3d 1289, 1294 (9th Cir. 1998). Due to this fact, the court can only reach Plaintiffs' *Pullman/England* request if it first determines that *Younger* abstention is not

appropriate. *See, e.g., United Parcel Serv., Inc. v. California Pub. Utility Comm'n.,* 77 F.3d 1178, 1184 n.5 (9th Cir. 1996); *Beltran v. State of California,* 871 F.2d 777, 782 and 783 n.8 (9th Cir. 1988).

Abstention generally is "an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it." *Miofsky v. Superior Court of State of California, In and For Sacramento County,* 703 F.2d 332, 338 (9th Cir. 1983) (internal quotations omitted). Indeed, courts in the federal system have the "virtually unflagging obligation" to exercise their jurisdiction, *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817-18 (1976), and should decline to do so only in the most limited of circumstances. *See, e.g., New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 368 (1989) (hereinafter "*NOPSI*").

That said, however, the United States Supreme Court has also explained that "*Younger v. Harris* and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings[,]" and that, while *Younger* itself involved federal-court attack against a pending state-court criminal case, "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Comm. v. Garden State Bar Assn.,* 457 U.S. 423, 431-32 (1982). Following *Middlesex,* the Ninth Circuit has found that an array of state interests could be important enough to justify

Younger abstention. *See, e.g., San Remo,* 145 F.3d at 1104 (land use regulations); *H.C. v. Koppel,* 203 F.3d 610, 613 (9th Cir. 2000) (family relations); *Woodfeathers, Inc. v. Washington County, Or.,* 180 F.3d 1017, 1021 (9th Cir. 1999) (local control of waste disposal and recycling); *Martinez v. Newport Beach City,* 125 F.3d 777, 781 (9th Cir. 1997) (validity of a state statute); *Hirsh v. Justices of Supreme Court of State of California,* 67 F.3d 708, 712 (9th Cir. 1995) (attorney disciplinary proceedings). Furthermore, the Ninth Circuit has, over the years, made seemingly-inconsistent statements about how the *Younger* doctrine should be applied, and has issued "standards [that] have not always captured all the relevant factors, and thus may have obscured rather than clarified the path to proper judicial decision making." *Green v. City of Tucson,* 255 F.3d 1086, 1089 (9th Cir. 2001) (*en banc*). Consequently, determining when *Younger* abstention is appropriate has not always been an easy task.

Recently, however, the Ninth Circuit took a great stride forward in clarifying exactly when *Younger* abstention is warranted. In its unanimous *en banc* decision *Green v. City of Tucson,* the Ninth Circuit approved of the three-pronged test that had long been this Circuit's framework for resolving *Younger* abstention questions,[10] but with a major caveat: that a

---

[10] "A recent iteration of this test ran as follows: "Absent extraordinary circumstances, *Younger* abstention is required if the state proceedings are (1) ongoing, (2) implicate important

(Continued on following page)

critical threshold must first be crossed before this three-pronged test can be applied. This initial step, one at risk of vanishing beneath the accumulated weight of *Younger* jurisprudence, is for the district court to determine whether "the federal relief sought would *interfere* in some manner in the state court litigation." *Green,* 255 F.3d at 1094 (emphasis added). This is an important consideration, the *en banc Green,* panel noted, because application of the three-pronged test alone risked erroneously "lead[ing] one to the conclusion that the plaintiffs in a state court proceeding who raise a federal issue may never file a parallel proceeding in federal court raising the same issue without running afoul of *Younger*." *Id.* at 1093.

The *en banc Green* decision stemmed from the Ninth Circuit's review of a district court's consideration of the *Younger* issue in a situation. where there were ongoing federal and state challenges to the constitutionality of an Arizona state statute.[11]

---

state interests, and (3) provide the Plaintiff an adequate opportunity to litigate federal claims." *H.C. v. Koppel,* 203 F.3d at 613 (internal quotations omitted). The *en banc* panel in *Green* found this formulation to be accurate. *Green,* 255 F.3d at 1091.

[11] Unlike the matter at hand, the state and federal court Plaintiffs in *Green* were different, and there was not a perfect identity of parties to the parallel actions. While these factors are relevant to part of the *en banc Green* opinion, *see Green,* 255 F.3d. at 1099-1104, they do not distinguish the heart of that opinion from the facts of the instant action insofar as *Green* squarely addresses the applicability of *Younger* abstention when there are parallel federal and state challenges to the constitutionality of a state statute. *See id.* at 1093-99.

Applying the conventional three-pronged *Younger* test, the district court found that abstention was warranted, *id.*, as did a three-judge panel of the Ninth Circuit. *See Green v. City of Tucson,* 217 F.3d 1081 (9th Cir. 2000). A petition for *en banc* rehearing was subsequently granted. *Green v. City of Tucson,* 243 F.3d 493 (9th Cir. 2000).

After rehearing, the *en banc* panel found that the district court had, understandably, lost sight of the interference requirement, whose lineage the latest *Green* decision then traced, most crucially to the United States Supreme Court's 1989 decision in *NOPSI.* After a thorough exegesis of that case, the *en banc Green* panel found that *NOPSI* provided guidance concerning two principles that were central both to *Green* and to the matter presently before this court. First, the *en banc Green* panel found that *NOPSI* emphatically demonstrated that a finding of interference was a prerequisite for the proper invocation of the *Younger* abstention doctrine.

> "NOPSI, then, clarifies that the three-part test we derived from *Middlesex* is a suitable guide for analysis *only* when the threshold condition for *Younger* abstention is present – that is, when the relief sought in federal court would in some manner directly 'interfere' with ongoing state judicial proceedings[.]"

Green v. City of Tucson, 255 F.3d at 1097 (emphasis added). Second, the *en banc Green* panel found that *NOPSI* taught that the mere existence of parallel

state and federal actions challenging the constitutionality of a state statute did not rise to the level of interference necessary to justify *Younger* abstention.

> "Any other view, as *NOPSI* emphasizes, would amount to the doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts, a doctrine that simply cannot be reconciled with the dual judicial system we have inherited and the concomitant obligation of the federal courts ordinarily to assert the jurisdiction conferred upon them. It is true, of course, that allowing parallel federal and state court litigation will not always promote judicial efficiency and could lead to conflicting results. But the interest of avoiding conflicting outcomes in the litigation of similar issues, while entitled to substantial deference in a unitary system, must of necessity be subordinated to the claims of federalism. Since the possibility of duplicative litigation is a price of federalism, the prospect of such duplication, without more, does not constitute interference with state court proceedings justifying a federal court's dismissal of a case properly within its jurisdiction."

Id. (internal quotations and citations omitted). It is precisely this concern with duplication that animates the *Younger* argument put forth by Defendants in the matter at hand. In light of the *en banc Green* decision, however, Defendants' contention is untenable. The court therefore finds that the instant proceedings do not run the risk of interfering with the parallel

state-court case in any way cognizable under the *Younger* doctrine, and that Defendants' motion for dismissal pursuant to *Younger* cannot succeed.

IV. *Pullman* Abstention

Since *Younger* abstention is not warranted in this case, the court now turns to Plaintiffs' request for a stay pursuant to *Railroad Comm'n v. Pullman Co., supra.* The *Pullman* abstention doctrine allows a district court, at its discretion, to "refrain from deciding constitutional questions which hinge on difficult state law issues, if the controversy would be terminated by resolution in state court of those issues." *Bank of America National T.& S. Assoc. v. Summerland County Water District,* 767 F.2d 544, 546 (9th Cir. 1985) (citing *Pullman,* 312 U.S. at 500-01). The Ninth Circuit has set forth a three-pronged test for the application of the *Pullman* doctrine.

> "*Pullman* abstention is appropriate when (1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) the possible determinative issue of state law is uncertain."

Confederated Salish v. Simonich, 29 F.3d 1398, 1407 (9th Cir. 1994). All three of these prongs are satisfied in this case.[12]

The first prong is satisfied because I-137 is a land use regulation, and land use questions indisputably touch upon sensitive areas of social policy. *See San Remo,* 145 F.3d at 1105 (citing *Sinclair Oil,* 96 F.3d at 401). The need for the adjudication of Plaintiffs' federal constitutional claims in this Court will be obviated if the state court strikes down I-137 on the state law grounds posited by Plaintiffs, *see e.g.,* Count IV, thus satisfying the second *Pullman* prong.[13] Finally, the Court finds that Plaintiffs' claims raise novel issues of state law concerning I-137's validity that have not previously been litigated and whose ultimate resolution is therefore in doubt. Consequently, the court finds that *Pullman* abstention is appropriate in this case as to Plaintiffs' remaining claims (Counts II, III and IV).

V. *England* Reservation

Plaintiffs ask the Court to sanction their reservation of federal law claims under the doctrine of

---

[12] Although Defendants strenuously object to a *Pullman* stay in this case, they have placed all of their eggs in the *Younger* basket, making no affirmative claim that the *Pullman* criteria are not satisfied here. As the court has rejected Defendants' *Younger* analysis, their argument against a *Pullman* stay is without merit.

[13] This court obviously has no opinion on the merits of Plaintiffs' state law claims.

England v. Louisiana State Board of Medical Examiners, supra. Such a reservation would protect Plaintiffs' ability to litigate their federal law claims in a federal forum. As the Ninth Circuit has explained:

> "[A] party who freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there forgoes his right to. return to federal District Court, [while] a party who reserves his claims under *England* retains his right to a federal forum even where the state court of its own accord renders a decision on the federal question, or where the state court's holding implies that the court considers the constitutional challenge to be without merit."

United Parcel Serv., Inc. v. California Pub. Utility Comm'n., 77 F.3d at 1183 (internal quotations and citations omitted). To effect a proper reservation under *England,* a party must:

> "1) inform the state courts that he is exposing his federal claims there only for the purpose of complying with [*Government & Civic Employees Organizing Comm., C.I.O. v. Windsor,* 353 U.S. 364 (1957)]; and 2) desist from freely and without reservation litigating his federal claims in state court."

Id. (internal quotations and citations omitted). After examining the complaint Plaintiffs filed in state court, the court finds that Plaintiffs have properly

complied with the *England* requirements.[14] Plaintiffs' state-court complaint expressly informs the state court that Plaintiffs have federal constitutional claims that they wish to have adjudicated in federal – not state – court, and alleges only violations of state law in its twelve counts. Plaintiffs therefore will be entitled to return to federal court at the conclusion of the state court proceedings if it remains necessary to litigate their reserved federal claims. Accordingly,

IT IS HEREBY ORDERED that Defendants' motion to dismiss is hereby GRANTED IN PART and DENIED IN PART. Count I of Plaintiffs' complaint is hereby DISMISSED WITH PREJUDICE. Counts V-IX of Plaintiffs' complaint are hereby DISMISSED WITHOUT PREJUDICE as unripe.

---

[14] The Court notes that ¶ 9 of Plaintiffs' state court complaint defines the federal constitutional claims, for purposes of notification of the *England* reservation, as "claims grounded in the due process and takings provisions of the Fifth Amendment of the United States Constitution, as applied to the State of Montana by the U.S. Constitution Fourteenth Amendment." Therefore, Plaintiffs have not sought an *England* reservation in state court for their federal Count Two (equal protection) claim or their Count Three (impairment of contract) claim. Whether this is an intentional omission or mere oversight, the Court cannot determine.

While Defendants have objected to Plaintiffs' *England* request, they again have only put forth a *Younger* argument against it. Defendants are correct that the assertion of an *England* reservation cannot defeat dismissal in situations where *Younger* abstention is warranted, but, for the reasons discussed above, this is not one of those situations. Therefore, Defendants' objection is without merit.

IT IS FURTHER ORDERED that Plaintiffs' motion to stay this case is hereby GRANTED, and this action is STAYED pending further order of the court.

IT IS FURTHER ORDERED that the parties shall file joint status reports every three months beginning October 15, 2001, informing this court of the status of the related state-court litigation. Immediately upon conclusion of that litigation, the parties shall file a joint status report advising this court whether this matter is ready to be returned to the active docket or whether the state court litigation has obviated the need for this court to consider Plaintiffs' reserved claims.

The clerk is directed to notify the parties of entry of this order.

Done and dated this day 30th of August, 2001.

/s/ Charles C. Lovell
CHARLES C. LOVELL
Senior United States District Judge

U.S. Const. Article III, Section 2, Clause 1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled. in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property. without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole

number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Mont. Code § 82-4-390. Cyanide heap and vat leach open-pit gold and silver mining prohibited

(1) Open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore-processing reagents is prohibited except as described in subsection (2).

(2) A mine described in this section operating on November 3, 1998, may continue operating under its existing operating permit or any amended permit that is necessary for the continued operation of the mine.